DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-166
Title: RadLAX Gateway Hotel, LLC, et al., Petitioners
v.
Amalgamated Bank
Docketed: August 10, 2011
Lower Ct: United States Court of Appeals for the Seventh Circuit
Case Nos.: (10-3597, 10-3598)
Decision Date: June 28, 2011
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Aug 5 2011	Petition for a writ of certiorari filed. (Response due September 9, 2011)
Sep 1 2011	Order extending time to file response to petition to and including October 11, 2011.
Sep 8 2011	Brief amici curiae of Bankruptcy Scholars filed.
Sep 9 2011	Brief amicus curiae of Loan Syndications and Trading Association filed.
Oct 5 2011	Order further extending time to file response to petition to and including October 18, 2011.
Oct 18 2011	Brief of respondent Amalgamated Bank in opposition filed.
Oct 28 2011	Reply of petitioners RadLAX Gateway Hotel, LLC, et al. filed.
Oct 31 2011	DISTRIBUTED for Conference of November 22, 2011.
Nov 28 2011	DISTRIBUTED for Conference of December 2, 2011.
Dec 5 2011	DISTRIBUTED for Conference of December 9, 2011.
Dec 12 2011	Petition GRANTED.
Jan 26 2012	Joint appendix filed. (Two Volumes) (Statement of costs filed.)
Jan 26 2012	Brief of petitioners RadLAX Gateway Hotel, LLC, et al. filed.
Feb 3 2012	SET OR ARGUMENT ON Monday, April 23, 2012.
Feb 10 2012	The time to file respondent's brief on the merits is extended to and including March 2, 2012.
Feb 16 2012	Record from U.S.C.A. for Seventh Circuit is electronic.
Feb 16 2012	Record from U.S.D.C. for Northern District of Illinois is electronic.
Feb 17 2012	CIRCULATED.
Mar 2 2012	Brief of respondent Amalgamated Bank filed. (Distributed)
Mar 5 2012	Brief amici curiae of Professors Richard Aaron, et al. filed. (Distributed)
Mar 8 2012	Brief amicus curiae of Bankruptcy Scholars filed. (Distributed)
Mar 9 2012	Brief amicus curiae of United States filed. (Distributed)
Mar 9 2012	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae

	and for divided argument filed.
Mar 9 2012	Brief amicus curiae of G. Eric Brunstad, Jr. filed. (Distributed)
Mar 9 2012	Brief amici curiae of Loan Syndications and Trading Association, et al. filed. (Distributed)
Mar 30 2012	Reply of petitioners RadLAX Gateway Hotel, LLC, et al. filed. (Distributed)
Apr 2 2012	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Apr 23 2012	Argued. For petitioners: David M. Neff, Chicago, Ill. For respondent: Deanne E. Maynard, Washington, D. C.; and Sarah E. Harrington, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)
Apr 23 2012	Justice Kennedy is recused in this case.
May 29 2012	Adjudged to be AFFIRMED. Scalia, J., delivered the opinion of the Court, in which all other Members joined, except Kennedy, J., who took no part in the decision of the case.
Jul 2 2012	JUDGMENT ISSUED

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

RADLAX GATEWAY HOTEL, LLC
and RADLAX GATEWAY DECK, LLC,
Petitioners,

v.

AMALGAMATED BANK,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 1129(b)(2)(A) of the Bankruptcy Code sets forth three alternative standards for determining if a chapter 11 plan is "fair and equitable" with respect to an objecting class of secured creditors. Petitioners, the Debtors, proposed a chapter 11 plan involving the sale of assets free of liens that satisfies one of these standards by providing their secured lender with the "indubitable equivalent" of its claim pursuant to Section 1129(b)(2)(A)(iii). In an appeal certified directly from the bankruptcy court, the Seventh Circuit held that the Debtors could only satisfy the statute by allowing their secured creditor to bid its claim in lieu of cash (i.e., credit bid) at the sale pursuant to Section 1129(b)(2)(A)(ii). This holding directly conflicts with the Third Circuit's decision in *In re Philadelphia Newspapers*, 599 F.3d 298 (3d Cir. 2010), and the Fifth Circuit's decision in *Scotia Pacific Co., LLC v. Official Unsecured Creditors' Comm. (In re Pacific Lumber Co.)*, 584 F.3d 229 (5th Cir. 2009). The question presented is:

> Whether a debtor may pursue a chapter 11 plan that proposes to sell assets free of liens without allowing the secured creditor to credit bid, but instead providing it with the indubitable equivalent of its claim under Section 1129(b)(2)(A)(iii) of the Bankruptcy Code.

RULE 29.6 STATEMENT

Petitioners RadLAX Gateway Hotel, LLC and RadLAX Gateway Deck, LLC (the "Debtors") are each owned 99% by RadLAX Gateway Holdings, LLC and 1% by RadLAX Gateway Project Management, LLC.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in *In re River Road Hotel Partners, LLC*, Nos. 10-3597, 10-3598, is reported at --- F.3d ----, 2011 WL 2547615 (7th Cir. 2011), and is set forth in the Appendix at 1a. The orders of the United States Bankruptcy Court for the Northern District of Illinois in *In re River Road Hotel Partners, LLC*, Case No. 09-B-30029, and *In re Radlax Gateway Hotel, LLC*, Case No. 09-B-30047, are not reported and are set forth in the Appendix at 38a and 40a.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on June 28, 2011. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 1129(b)(1):

> Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or

interests that is impaired under, and has not accepted, the plan.

11 U.S.C. § 1129(b)(2)(A):

For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides –

(i) (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

11 U.S.C. § 363(k):

At a sale under subsection (b) of this section of property that is subject to a lien that secures an

allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

STATEMENT OF THE CASE

This case involves perhaps the most hotly-debated issue of bankruptcy law today – whether the Bankruptcy Code provides a secured creditor with the absolute right to credit bid at the sale of its collateral free of liens through a chapter 11 plan. Section 1129 of the Bankruptcy Code enumerates the requirements a debtor must meet to confirm a chapter 11 plan, including the requirement that each class of impaired creditors accepts the plan. *See* 11 U.S.C. § 1129(a)(8). Section 1129(b), however, allows a debtor to confirm a plan over the objection of a class of creditors—a so-called "cramdown" plan—if, among other things, the plan is "fair and equitable" to the objecting class. Section 1129(b)(2)(A) lists three ways in which a plan may be "fair and equitable" to an objecting class of secured creditors: (i) if the secured creditor retains its lien and is paid deferred cash payments totaling at least the present value of its collateral; (ii) if the secured creditor is allowed to credit bid at the sale of its collateral free of its lien; or (iii) if the secured creditor receives the indubitable equivalent of its claim.

The Seventh Circuit in this case held that any chapter 11 plan involving the sale of assets free of liens may only be made pursuant to Section 1129(b)(2)(A)(ii) of the Bankruptcy Code, which requires a debtor to allow the secured creditor to

credit bid. This decision is in direct conflict with the Third Circuit's decision in *In re Philadelphia Newspapers*, 599 F.3d 298 (3d Cir. 2010), a case in which, under nearly identical facts, the court held that a debtor may instead pursue such a sale under a chapter 11 plan by providing the secured creditor the indubitable equivalent of its claim pursuant to Section 1129(b)(2)(A)(iii). The Seventh Circuit's decision is also in conflict with the Fifth Circuit's decision in *Scotia Pacific Co., LLC v. Official Unsecured Creditors' Comm. (In re Pacific Lumber Co.)*, 584 F.3d 229 (5th Cir. 2009), which held that a sale of assets free of liens through a chapter 11 plan may occur under Section 1129(b)(2)(A)(iii). The petitioners, the Debtors, respectfully submit that the Seventh Circuit, unlike the Third and Fifth Circuits, fundamentally misconstrued the plain language of Section 1129(b)(2)(A), which permits the bankruptcy court to confirm a chapter 11 plan as "fair and equitable" with respect to an objecting class of secured creditors if any one of its three subparts is satisfied.

A. Factual Background

The Debtors own the Radisson Hotel at Los Angeles International Airport and an adjacent, partially-completed parking structure. In November 2007, the Debtors obtained a $142 million construction loan from the Longview Ultra Construction Loan Investment Fund, for which Amalgamated Bank serves as trustee and administrative agent (the "Lender"), to acquire the property, renovate the hotel, and build the new parking structure. Due to the severe economic

downturn beginning in 2008 and the Lender's refusal to advance funding to complete the parking structure, the Debtors were forced to file voluntary petitions for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Illinois on August 17, 2009.

Early in their bankruptcy cases, the Debtors embarked on a marketing campaign to sell the hotel and parking structure pursuant to a chapter 11 plan. Through these efforts, the Debtors procured a bidder that offered to purchase substantially all of the Debtors' assets for a cash purchase price of $47.5 million, which was later increased to $55 million.

On June 4, 2010, the Debtors filed their joint chapter 11 plan, which proposed the auction sale of substantially all of their assets with the proceeds distributed to various creditor constituencies consistent with the Bankruptcy Code's priority scheme. In support of their plan, the Debtors filed a motion to approve certain procedures for the asset sale, which specified that the sale would be conducted pursuant to Section 1129(b)(2)(A)(iii) of the Bankruptcy Code, and no secured creditor would be permitted to credit bid at the sale. The Lender objected to the proposed bid procedures on the grounds that a sale of its collateral free of liens could only occur under Section 1129(b)(2)(A)(ii), which required the Debtors to allow the Lender to credit bid.

B. The Bankruptcy Court Opinion

Bankruptcy Judge Bruce Black denied the Debtors' bid procedures motion. He acknowledged that the majority in *Philadelphia Newspapers* endorsed the Debtors' interpretation of Section 1129(b)(2)(A)(iii), but he found the dissent in that case more persuasive and held that the Debtors could not sell their assets free of liens under a plan pursuant to Section 1129(b)(2)(A)(iii). App. at 42a. Recognizing the vital importance of this issue to a broad range of bankruptcy cases, Judge Black certified the appeal directly to the Seventh Circuit. App. at 35a-36a.

C. The Seventh Circuit Opinion

The Seventh Circuit affirmed the bankruptcy court's decision, recognizing its clear break from the Third Circuit's decision in *Philadelphia Newspapers* and the Fifth Circuit's decision in *Pacific Lumber*. App. at 14a. The court analyzed the plain language of Section 1129(b)(2)(A) and concluded that subsection (iii) does not indicate whether it applies to every type of chapter 11 plan or only those that fall outside of subsections (i) and (ii). *Id.* at 17a. In doing so, the court rejected the majority's conclusion in *Philadelphia Newspapers* that Congress' use of the disjunctive "or" to connect the three subsections in Section 1129(b)(2)(A) meant that a debtor could proceed under any of the three subsections. *Id.* at 17a n.5.

Finding section 1129(b)(2)(A)(iii) ambiguous, the court turned to canons of statutory interpretation and reasoned that an interpretation of subsection

(iii) that permits confirmation of a chapter 11 plan involving the sale of assets free of liens without credit bidding would render subsections (i) and (ii) superfluous. *Id.* at 22a-23a. Citing extensively to Circuit Judge Thomas Ambro's dissent in *Philadelphia Newspapers*, the court agreed that secured creditor protections found in other parts of the Bankruptcy Code provide further support for interpreting subsection (iii) as not permitting asset sales free of liens without credit bidding. *Id.* at 24a-25a.

Jurisdiction in the court of first instance, the United States Bankruptcy Court for the Northern District of Illinois, is founded upon 28 U.S.C. §§ 157(a), 1334(a) and Internal Operating Procedure 15(a) for the United States District Court for the Northern District of Illinois.

REASONS FOR GRANTING CERTIORARI

The Court should grant certiorari because the Seventh Circuit's decision directly conflicts with the Third Circuit's decision in *Philadelphia Newspapers* and the Fifth Circuit's decision in *Pacific Lumber*, the question presented is of pressing national importance in bankruptcy law, and this case presents an ideal vehicle for deciding that question.

A. The Seventh Circuit's Decision Creates an Untenable Conflict with the Third and Fifth Circuits

As the Seventh Circuit recognized, the decision below squarely conflicts with the Third Circuit's

decision in *Philadelphia Newspapers* and the Fifth Circuit's decision in *Pacific Lumber*. The Third, Fifth and Tenth Circuits have all recognized that Congress' use of the word "or" to separate the three subsections of Section 1129(b)(2)(A) is unequivocal evidence that a debtor may confirm a cramdown plan through any one of these alternatives. *Philadelphia Newspapers*, 599 F.3d at 305 ("The use of the word 'or' in this provision operates to provide alternatives – a debtor may proceed under subsections (i), (ii), *or* (iii)"); *Pacific Lumber*, 584 F.3d at 245 ("This court has subscribed to the obvious proposition that because the three subsections of § 1129(b)(2)(A) are joined by the disjunctive 'or,' they are alternatives"); *Wade v. Bradford*, 39 F.3d 1126, 1130 (10th Cir. 1994) ("These requirements are written in the disjunctive, requiring a plan to satisfy only one before it could be confirmed over creditor's objection."). Furthermore, the Third and Fifth Circuits have each expressly approved a sale of assets free of liens through a chapter 11 plan under subsection (iii) without credit bidding, rulings directly contradicted by the Seventh Circuit's decision in this case.

1. The Third Circuit's Decision in *Philadelphia Newspapers*

In *Philadelphia Newspapers*, the Third Circuit approved bid procedures for an auction sale of assets free of liens through a chapter 11 plan without credit bidding. The bid procedures in *Philadelphia Newspapers* were nearly identical to the procedures

the Debtors proposed in this case, and contained the same operative language:

> The Plan Sale is being conducted under sections 1123(a) and (b) and 1129(b)(2)(A)(iii) of the Bankruptcy Code, and not section 363 of the Bankruptcy Code. As such, no holder of a lien on any assets of the Debtors shall be permitted to credit bid pursuant to section 363(k) of the Bankruptcy Code.

Philadelphia Newspapers, 599 F.3d at 302.

Unlike the Seventh Circuit in this case, the majority in *Philadelphia Newspapers* held that the structure and language of Section 1129(b)(2)(A) is unambiguous and thus the statute should be applied according to its plain meaning. First, the majority reasoned that Congress' use of the word "or" to separate the three subsections of 1129(b)(2)(A) was "not without purpose" and therefore a debtor may pursue confirmation of a cramdown plan through any one of the three alternatives. *Id.* at 309. In further support of this conclusion, the majority cited to Section 102(5) of the Bankruptcy Code, which instructs that "'or' is not exclusive." *Id.* at 305. The Seventh Circuit rejected the Third Circuit's plain text analysis, suggesting instead that there are several examples in the Bankruptcy Code where the word "or" is exclusive. App. at 17a n.5.

Second, the majority in *Philadelphia Newspapers* held that the phrase "indubitable equivalent" in subsection (iii) was not ambiguous, tracing its origins to Judge Learned Hand's opinion in *In re Murel Holding Corp.*, 75 F.2d 941, 942 (2d Cir. 1935). *Philadelphia Newspapers*, 599 F.3d at 310.

Referencing the dictionary definitions of "indubitable" and "equivalent," the majority defined the phrase indubitable equivalent in subsection (iii) as "the unquestionable value of a lender's secured interest in the collateral." *Id.* The majority explained that "a term in a statute is not ambiguous merely because it is broad in scope." *Id.* Accordingly, the majority concluded that subsection (iii) does not usurp subsections (i) and (ii), but instead all three subsections work together to protect the fair return on a secured creditor's claim. *Id.* at 310-11.

In reaching its decision, the Third Circuit was careful to highlight the critical distinction between approving the debtors' bid procedures and confirming the chapter 11 plan. *Id.* at 312-13. Just as in this case, only the threshold issue of bid procedures for the proposed sale was before the court. As the majority correctly recognized, "it is the plan of reorganization, and not the auction itself, that must generate the 'indubitable equivalent.'" *Id.* at 312. Whether the debtors would ultimately be able to confirm their plan by satisfying the indubitable equivalent standard set forth in subsection (iii) was an issue to be decided by the bankruptcy court after the sale was completed. *Id.* at 313. Accordingly, the question presented in *Philadelphia Newspapers*, as in this case, is whether a chapter 11 plan involving the sale of collateral free of liens without credit bidding may ever be confirmed under subsection (iii) as a matter of law. The majority in *Philadelphia Newspapers* held that it can.

In a lengthy and sharply-worded dissent, Circuit Judge Thomas Ambro assailed the majority's decision, claiming that it cuts against "the first 30 years of Bankruptcy Code jurisprudence." *Id.* at 319. Judge Ambro rejected the majority's conclusion that the plain language of Section 1129(b)(2)(A) is unambiguous and allows a debtor to choose to satisfy any of the three subsections when confirming a cramdown plan. Judge Ambro reasoned that "Congress did not list the three alternatives as routes to cramdown confirmation that were universally applicable to any plan, but instead as distinct routes that apply specific requirements." *Id.* at 325.

Judge Ambro then embarked on an extensive analysis of alternative canons of statutory construction, legislative history, and secured creditor protections found in other sections of the Bankruptcy Code to reach his conclusion that all chapter 11 plans involving the sale of assets free of liens over the objection of secured creditors may only be confirmed through subsection (ii), which permits credit bidding. In closing, Judge Ambro warned that the majority's decision would "force future secured creditors to adjust their pricing accordingly, potentially raising interest rates or reducing credit availability to account for the possibility of a sale without credit bidding." *Id.* at 337.

Circuit Judge D. Brooks Smith concurred entirely in Judge Fisher's majority opinion except for one section discussing legislative history, stating that "recourse to legislative history . . . [is] unnecessary as the statutory language of § 1129(b)(2)(A) is unambiguous." *Id.* at 318. Judge Smith rejected the

"near-gymnastics" required by the dissent to reach its conclusion, agreeing with Judge Fisher that statutory text compels the conclusion that Section 1129(b)(2)(A) does not require credit bidding in all plan sales free of liens. *Id.* at 319. The spirited debate among the panel in *Philadelphia Newspapers* underscores the importance of this decision and its impact across a wide range of bankruptcy cases.

2. The Fifth Circuit's Decision in *Pacific Lumber*

In *Pacific Lumber*, the Fifth Circuit held that a sale of assets through a chapter 11 plan without credit bidding can be confirmed under Section 1129(b)(2)(A)(iii) by providing the objecting secured creditor with a present cash payment equal to the present value of its collateral (i.e., the indubitable equivalent of its secured claim). This decision is in accord with the Third Circuit's decision in *Philadelphia Newspapers*, but directly at odds with the Seventh Circuit's decision in this case. Like the Third Circuit, the Fifth Circuit found that the phrase "indubitable equivalent" was not ambiguous, explaining that "Congress did not adopt indubitable equivalent as a capacious but empty semantic vessel" and that subsection (iii) presents "no less demanding a standard than its companions." *Pacific Lumber*, 584 F.3d at 246. The court recognized that while the use of subsection (ii) might be imperative in some cases, it does not exclusively apply where the plan provides a current cash payment equal to the amount of the secured claim, precisely the treatment proposed by the Debtors in this case. *Id.*

B. This Case Presents an Ideal Vehicle to Resolve the Circuit Split

The Seventh Circuit acknowledged that its decision created a clear and direct conflict with the Third and Fifth Circuits. *See* App. at 14a (citing contrary decisions in *Philadelphia Newspapers* and *Pacific Lumber*). Indeed, Circuit Judge David Hamilton explained the implications of the court's decision at oral argument in the Seventh Circuit, telling the Lender's counsel: "In essence, you're asking us to send this issue to the Supreme Court . . . to agree with you, we've got to create a circuit split." App. at 28a. Furthermore, numerous bankruptcy scholars and commentators have recognized the need for clear direction from the Court on this important issue of bankruptcy law.[1]

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[1] *See, e.g.*, Jason S. Brookner, Pacific Lumber *and* Philadelphia Newspapers*: The Eradication of a Carefully Constructed Statutory Regime Through Misinterpretation of Section 1129(b)(2)(A) of the Bankruptcy Code*, 85 AM. BANKR. L.J. 127, 159-60 (Spring 2011) ("Until such time, however, as the Supreme Court provides a definitive answer to the question, debtors appear to have more flexibility under § 1129(b)(2)—and secured creditors more to fear—than previously believed"); Hollace T. Cohen, *Is the* Philadelphia Newspapers, LLC *Decision the Death Knell to Credit Bidding in a Sale Under a Plan?*, 20 J. BANKR. L. & PRAC. 1 Art. 1 (Jan. 2011) ("Until such time as the U.S. Courts of Appeal in Circuits other than the Third and Fifth Circuits or the U.S. Supreme Court speaks to the issues concerning a secured creditor's right to credit bid in a sale under a plan, secured creditors (not only in cases in the Third and Fifth Circuits but other Circuits as well) will be well-advised to take all precautions to preserve the right to credit bid in connection with providing debtor-in-possession financing or consenting to the use of cash

This case is an ideal vehicle for the Court to resolve the circuit split; it presents a precise question of law with no material factual disputes. *See* App. at 10a ("this appeal presents a single, relatively straightforward question concerning the proper interpretation of Section 1129(b)(2)(A) and its subsections."). Furthermore, this case presents a rare opportunity for the Court to address this important issue. Although chapter 11 plans involving asset sales are common, decisions on them are rarely reviewed because of the inherently short time periods involved. Indeed, the Seventh Circuit expressly recognized the "economic necessity" of short deadlines for asset sales in bankruptcy and concluded that "it will rarely, if ever, be the case that an appellate court would have the opportunity to review a bankruptcy court's confirmation decision prior to the expiration of such deadlines." App. at 9a. Accordingly, there may be limited opportunities for the Court to resolve this issue despite its prevalence and importance in bankruptcy law.

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collateral."); Kenneth Noble, *Seventh Circuit Upholds Right of Secured Creditors to Credit Bid Under a Chapter 11 Plan*, July 26, 2011, *available at* 2011 WLNR 14776589 ("Indeed, the emerging high-profile split in the circuits over this core right of secured creditors will likely require an ultimate resolution before the United States Supreme Court."); Brian Trust & Thomas S. Kiriakos, *Seventh Circuit Upholds Secured Lenders' Right to Credit Bid in Asset Sales Under a Chapter 11 Plan*, July 8, 2011, *available at* 2011 WLNR 13580283 ("Moreover, as the [*River Road*] decision has now created a split among the appellate circuits as to the interpretation of Section 1129(b)(2)(A)'s "fair and equitable" standards, such contradictory rulings may result in eventual Supreme Court review and determination of the issue.").

C. The Question Presented Regarding Secured Creditor Protections is Central to Nearly Every Chapter 11 Bankruptcy Involving the Sale of Collateral

Although the traditional aim of chapter 11 of the Bankruptcy Code is to preserve and reorganize an ongoing enterprise, debtors are increasingly turning to chapter 11 to facilitate a sale of assets free of liens. *See, e.g.*, Vincent S. J. Buccola & Ashley C. Keller, *Credit Bidding and the Design of Bankruptcy Auctions*, 18 GEO. MASON L. REV. 99, 99 (2010) (noting that more than half of debtors in chapter 11 now seek to sell their assets). Judge Black acknowledged this trend in certifying the appeal directly to the Seventh Circuit:

> [T]he determination whether to permit credit bidding at auction sales in bankruptcy is a matter of public importance. Under current economic conditions a large portion of chapter 11 cases involving commercial real property progress to a sale of assets rather than to reorganization, and many of those sales involve lenders who are owed more than the property is worth. Whether such lenders can credit bid is crucial to the outcome of the sales. As a result, this issue has received significant attention among bankruptcy commentators.

App. at 35a-36a.

As Judge Black observed, the protections afforded secured creditors in the sale of collateral free of liens are critically important. Paramount among these

protections is the secured creditor's right to credit bid provided by Section 363(k) and incorporated into certain plan sales by Section 1129(b)(2)(A)(ii). For this reason, the Loan Syndications and Trading Association ("LSTA"), a leading industry group for secured lenders, participated as amicus curiae in both the Third Circuit appeal in *Philadelphia Newspapers* and the Seventh Circuit appeal in this case.

At the same time, providing a debtor with flexibility to propose a viable chapter 11 plan is one of the primary purposes of the Bankruptcy Code. To that end, Section 1123(a)(5) enumerates various methods through which a debtor may implement a plan, including the "sale of all or any part of the property of the estate, either subject to or free of any lien . . ." *See* 11 U.S.C. § 1123(a)(5)(D). The design of such plan sales under Section 1129(b)(2)(A) is vitally important to fulfilling the rehabilitative goals of the Bankruptcy Code. It is therefore crucial for the courts to apply a uniform rule regarding the ability of a debtor to pursue a sale of assets free of liens through a chapter 11 plan.

The Seventh Circuit's decision below marks a clean break from the Third and Fifth Circuits by limiting all proposed asset sales through a chapter 11 plan to Section 1129(b)(2)(A)(ii), which provides for credit bidding. This circuit split creates uncertainty regarding a central component of plan sales in bankruptcy and invites forum shopping by potential debtors. It further upsets the settled expectations of the secured lending industry, as observed by Judge Ambro. *Philadelphia Newspapers*, 599 F.3d at 337. The impact of this

inter-circuit conflict is exacerbated by the fact that many large chapter 11 bankruptcy cases are currently filed in the District of Delaware, in the Third Circuit. As plan sales have become the central feature of chapter 11, it is critical that the Court resolve the controversial issue of whether a secured creditor has the right to credit bid at any plan sale of collateral under Section 1129(b)(2)(A).

D. The Seventh Circuit's Decision is Wrongly Decided

The Seventh Circuit's decision below disregards established principles of statutory construction to reach a conclusion at odds with the plain language of Section 1129(b)(2)(A). As this Court has repeatedly instructed: "courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). The Seventh Circuit ignored this maxim by declining to apply the plain language of Section 1129(b)(2)(A), which provides three alternative ways to satisfy the "fair and equitable" requirement of Section 1129(b)(1). As highlighted by the Third Circuit in *Philadelphia Newspapers* and the Fifth Circuit in *Pacific Lumber*, the use of the word "or" to join the three subparts of Section 1129(b)(2)(A) compels the conclusion that a debtor may pursue plan confirmation by satisfying any one of these criteria. *Philadelphia Newspapers*, 599 F.3d at 305; *Pacific Lumber*, 584 F.3d at 245. In stark contrast, the Seventh Circuit dismissed the import of the

structure of the statute in a footnote, concluding that "the mere presence of the term 'or' is insufficient to resolve the case." App. at 17a n.5. Instead, the court focused only on subsection (iii), reasoning that nothing in its language indicates whether it can generally apply to all chapter 11 plans or only those not covered by subsections (i) and (ii). *Id.* at 17a.

With this supposed ambiguity, the court concluded that subsection (iii) must be limited only to plans that cannot be confirmed through subsections (i) and (ii). *Id.* at 23a-25a. Otherwise, the court reasoned, subsection (iii) would render the other subsections superfluous. *Id.* at 23a. Consequently, in the Seventh Circuit's view, despite the clear language of Section 1129(b)(2)(A), a plan involving the sale of assets free of liens may not be confirmed as fair and equitable even if it provides the secured creditor with the indubitable equivalent of its claim under subsection (iii). The court's conclusion fundamentally misreads Section 1129(b)(2)(A) and violates the bedrock principle of statutory construction that requires the application of an unambiguous statute according to its plain terms. Accordingly, this Court should issue a writ of certiorari and reverse the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 5, 2011

APPENDIX

Appendix to the
Petition for a Writ of Certiorari

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In the
United States Court of Appeals
For the Seventh Circuit

NOS. 10-3597 & 10-3598

IN THE MATTER OF:
RIVER ROAD HOTEL PARTNERS, LLC,
RIVER ROAD EXPANSION PARTNERS, LLC,
RADLAX GATEWAY HOTEL, LLC AND
RADLAX GATEWAY DECK, LLC,

Debtors-Appellants,

v.

AMALGAMATED BANK,

Appellee.

Appeals from the United States Bankruptcy Court
for the Northern District of Illinois,
Eastern Division.
Nos. 09-B-30029, 09-B-30047—**Bruce W. Black**,
Bankruptcy Judge

ARGUED APRIL 7, 2011—DECIDED JUNE 28, 2011

Before CUDAY, MANION, and HAMILTON,
Circuit Judges

CUDAHY, *CIRCUIT JUDGE*. Debtors-Appellants appeal from a bankruptcy court order denying the

bid procedures motions that they filed in connection with their Chapter 11 reorganization plans. They argue that the bankruptcy court erred in finding that their plan could not be confirmed over the objections of its secured creditors because it did not qualify for "fair and equitable" status under 11 U.S.C. § 1129(b)(2)(A). We affirm.[1]

I. Factual Background

A. The River Road Debtors

In 2007 and 2008, River Road Hotel Partners, LLC, River Road Expansion Partners, LLC, and related entities ("the River Road Debtors") built the InterContinental Chicago O'Hare Hotel and affiliated event space. In order to construct the hotel and event space, these entities obtained construction loans totaling approximately $155,500,000 from the Longview Ultra Construction Loan Investment Fund and the Longview Ultra I Construction Loan Investment Fund ("the River Road Lenders"). The loan documents designated Amalgamated Bank as the administrative agent and trustee of the River Road Lenders.

The InterContinental Chicago O'Hare Hotel and affiliated facilities opened in September 2008. Several months later, the River Road Debtors

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[1] This opinion has been circulated among all judges of this court in regular active service pursuant to Circuit Rule 40(e). No judge asked to hear this case en banc. Judge Flaum took no part in the consideration or decision of this case.

requested that the River Road Lenders supply them with several million dollars in additional funding so that they could finish building the hotel's restaurant and pay their general contractors and suppliers. The River Road Lenders entered into negotiations with the River Road Debtors concerning the conditions under which additional funding would be provided, but the parties could not agree on mutually satisfactory terms.[2]

On August 17, 2009, each of the River Road Debtors filed voluntary petitions for relief under Chapter 11 of 11 U.S.C. §§ 101, *et seq.* (the Bankruptcy Code, hereinafter "the Code") in the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division. At the time the petition was filed, the River Road Debtors owed at least $140,000,000 on the loans, with over $1,000,000 in interest accruing per month. In addition, approximately $9,500,000 in mechanics' liens have been asserted against the InterContinental Chicago O'Hare Hotel and its affiliated event spaces.

B. The RadLAX Debtors

In 2007, RadLAX Gateway Hotel, LLC, purchased the property now known as the Radisson

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[2] The River Road Lenders hesitancy to extend the River Road Debtors additional credit is understandable, given that the River Road Debtors had already been provided with additional funds once and defaulted under one of the existing loans by failing to make required interest payments.

Hotel at Los Angeles International Airport. In order to purchase the hotel, pay for renovations and build a parking structure on an adjacent parcel of real estate (which was to be owned by a related entity, RadLAX Gateway Deck, LLC), RadLAX Gateway Hotel, LLC, and its affiliates ("the RadLAX Debtors") obtained a construction loan totaling approximately $142,000,000 from the Longview Ultra Construction Loan Investment Fund ("the RadLAX Lenders"). The loan documents designated Amalgamated Bank as the administrative agent and trustee of the RadLAX Lenders.

During the course of building the parking structure the RadLAX Debtors incurred several million dollars of unanticipated costs. Around March 2009, the RadLAX Debtors ran out of funds and had to halt construction.[3] The RadLAX Lenders entered into negotiations with the RadLAX Debtors concerning the conditions under which additional funding would be provided, but the parties could not agree on mutually satisfactory terms.

On August 17, 2009, each of the RadLAX Debtors filed voluntary petitions for relief under Chapter 11 of the Code in the United States Bankruptcy Court for the Northern District of

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[3] While the RadLAX Lenders claim that the RadLAX Debtors exhausted all of the money available under their loan, the RadLAX Debtors claim that they only came up short because the RadLAX Lenders improperly denied their construction draw requests. Which account is correct is inconsequential for the purposes of this appeal.

Illinois, Eastern Division. At the time the petition was filed, the RadLAX Debtors owed at least $120,000,000 on the loans, with over $1,000,000 in interest accruing per month. In addition, over $15,000,000 in mechanics' liens have been asserted against the RadLAX properties.

C. Proceedings Before the Bankruptcy Court

On August 20, 2009, the bankruptcy court entered orders directing the joint administration of the River Road Debtors' bankruptcy cases under Case No. 09-30029. The court also entered orders directing the joint administration of the RadLAX Debtors' bankruptcy cases under Case No. 09-30047. Each set of Debtors continues to operate their businesses as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Code.

On June 4, 2010, the River Road and RadLAX Debtors (collectively, "the Debtors") submitted their reorganization plans to the bankruptcy court for confirmation. Both plans sought to sell substantially all of the Debtors' assets, with the proceeds to be distributed among the Debtors' creditors in accordance with the Code's priority rules. The Debtors also filed motions requesting the court's approval of their proposed procedures for conducting the asset sales. Both sets of proposals sought to auction off the Debtors' assets to the highest bidder, with the initial bid in each auction being supplied by a stalking horse bidder that had been lined up in the post-petition, pre-plan period. In one of their bid

procedures motions, the River Road Debtors claimed that they had procured a stalking horse offer of $42,000,000 for their assets. On June 22, 2010, the RadLAX Debtors filed copies of a proposed asset purchase agreement that offered $47,500,000 for their assets.

On July 8, 2010, Amalgamated Bank, on behalf of the River Road and RadLAX Lenders (collectively, "the Lenders"), filed objections to the Debtors' proposed bid procedures. Because the Debtors' plans would impair the Lenders' interests and the Lenders had not accepted the plans, they could not be confirmed unless they qualified for one of the exceptions listed in Section 1129(b)(2)(A) of the Code. *See* 11 U.S.C. § 1129(a)(8), (b). Amalgamated argued that the Debtors' plans could not satisfy Section 1129(b)(2)(A)'s requirements because they sought to sell encumbered assets free and clear of liens without allowing the Lenders to bid their credit at the asset auctions, in violation of 11 U.S.C. § 1129(b)(2)(A)(ii)'s requirement that secured lenders be given credit-bidding rights. The Debtors filed omnibus replies to Amalgamated's objections, arguing that, while their plans did not comply with Section 1129(b)(2)(A)(ii)'s requirements, they were still confirmable because they satisfied Section 1129(b)(2)(A)(iii)'s requirements.

On July 22, 2010, the bankruptcy court orally ruled that the Debtors' plans could not be confirmed under Section 1129(b)(2)(A)(iii). On October 5, 2010, the court entered orders denying the Debtors' bid procedure motions. The Debtors filed notices of

appeal and motions requesting that the bankruptcy court certify their appeals directly to this court pursuant to 11 U.S.C. § 158(d)(2)(A). On November 4, 2010, the court entered certifications for direct appeal to this court for both cases. On November 30, 2010, we entered an order authorizing and consolidating the River Road and RadLAX appeals.

II. Discussion

This appeal presents two issues for this court to decide. First, we must determine whether events that occurred subsequent to the filing of the appeal have mooted the parties' dispute. Second, if we find that the appeal is not moot, we must turn to the merits of the Debtors' appeal and decide whether the bankruptcy court's interpretation of 11 U.S.C. § 1129(b)(2)(A) was correct.

A. The Issue Raised by the Debtors' Appeal Is Not Moot

The Lenders claim that it would be inappropriate for this court to review the bankruptcy court's denial of the Debtors' bid procedure motions because the Debtors' proposed plans are no longer pending before the bankruptcy court. The Lenders contend that the reorganization plans that the court originally considered are no longer viable due to the passing of several expiration dates contained in the asset purchase agreements that the Debtors filed. They alternatively argue that statements from the Debtors indicate that the Debtors have abandoned their original reorganization plans.

We reject the Lenders' mootness argument. While "it is well-settled that a federal court has no authority to give opinions upon moot questions or abstract propositions," *Porco v. Trs. of Ind. Univ.*, 453 F.3d 390, 394 (7th Cir. 2006), an issue will not be considered moot unless the parties lack a "legally cognizable interest in the outcome." *Olson v. Brown*, 594 F.3d 577, 580 (7th Cir. 2010). It does not appear that the Debtors' reorganization plans suffer from either of the defects—the passing of expiration dates or abandonment—identified by the Lenders. On February 15, 2011, the RadLAX Debtors filed an amended asset purchase agreement with the bankruptcy court that largely resembled the agreement that was submitted in connection with the original reorganization plans. On March 2, 2011, the River Road Debtors filed a similar agreement. None of the confirmation deadlines contained in the amended agreements have expired. Further, the Debtors' statements before this court and the fact that they have filed amended agreements provide convincing evidence that the Debtors have not abandoned their asset sale plans.

Even if we were to find that the Debtors' original reorganization plans were based on asset purchase agreements that had expired, the Lenders have failed to show why this appeal would not fit squarely within the exception to mootness that we have recognized for cases that, due to timing issues, would otherwise evade review. *See, e.g., Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007); *Krislov v. Rednour*, 226 F.3d 851,

858 (7th Cir. 2000). A court can disregard mootness and retain jurisdiction over an appeal when the challenged action is (1) too short in duration to be fully litigated prior to cessation or expiration and (2) there is a reasonable expectation that the same appealing party will be subject to the same action again. *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. at 462.

This appeal satisfies both of these requirements. First, essentially all bankruptcy plans that seek to liquidate the debtor's assets will be based on asset purchase agreements that contain sales provisions with confirmation deadlines. These deadlines are, by economic necessity, quite short in duration. Hence, it will rarely, if ever, be the case that an appellate court would have the opportunity to review a bankruptcy court's confirmation decision prior to the expiration of such deadlines. Second, it is reasonable to expect that, if this appeal were dismissed for mootness, the Debtors would simply re-file their reorganization plans with new asset purchase agreements and the bankruptcy court would deny confirmation on the same grounds, giving the Debtors grounds for bringing the same appeal before this court.

B. 11 U.S.C. § 1129(b)(2)(A) Does Not Authorize Debtors To Use Subsection (iii) To Confirm a Reorganization Plan that Seeks To Sell Encumbered Assets Free and Clear of Liens Without Providing Secured Creditors the Right To Credit Bid

The Debtors contends that the bankruptcy court misinterpreted Section 1129(b)(2)(A) of the Code when it held that their plans could not be confirmed because they did not "comply with the specific requirements of Section 1129(b)(2)(A)(ii)." They argue that their plans should have been confirmed because they satisfied the conditions set forth in Section 1129(b)(2)(A)(iii). Thus, this appeal presents a single, relatively straightforward question concerning the proper interpretation of Section 1129(b)(2)(A) and its subsections.

The bankruptcy court held that, when a debtor's reorganization plan has not been approved by its secured creditors and proposes the sale of encumbered assets free and clear of liens, Section 1129(b)(2)(A) provides the exclusive means by which it can be confirmed. The court did not attempt to provide its own in-depth justification for its construal of Section 1129(b)(2)(A), but stated that its holding was based upon the statutory analysis set forth in Judge Ambro's dissent in *In re Philadelphia Newspapers*, 599 F.3d 298 (3d Cir. 2010). Because we review a bankruptcy court's interpretation of the Code's provisions under the *de novo* standard, we must conduct our own, independent analysis of

Section 1129(b)(2)(A)'s meaning. *Frey v. EPA*, 403 F.3d 828, 833 (7th Cir. 2005).

(1) Overview of Section 1129(b)(2)(A) and Relevant Precedents

Before attempting to decipher Section 1129(b)(2)(A)'s proper meaning, a brief review of the statute and the way it has been construed by the courts is merited. Section 1129 of the Code sets forth the criteria that a debtor's Chapter 11 reorganization plan must satisfy to be confirmed by a bankruptcy court. While the Code generally requires that reorganization plans be accepted by each class of claimants (or, alternatively, leave the claims of non-assenting classes unimpaired), *see* 11 U.S.C. § 1129(a)(8), Subsection (b) of Section 1129 excepts certain plans from this requirement. Plans that are confirmed under Section 1129(b) are often referred to as cramdown plans because they have been "crammed down the throats of objecting creditors." *Kham & Nate's Shoes No. 2, Inc. v. First Bank*, 908 F.2d 1351, 1359 (7th Cir. 1990). Subsection (b)(1) states that, in order for a plan to be confirmed over the objection of a class of creditors, it must be "fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." Subsection (b)(2)(A) defines what constitutes "fair and equitable" treatment in the secured creditor context. It states that a plan is "fair and equitable" if it provides:

(i)

(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

11 U.S.C. § 1129(b)(2)(A).

Traditionally, the majority of cramdown plans have sought confirmation under Subsection (ii) of 1129(b)(2)(A). Given the detailed and carefully tailored language used in this subsection, it has rarely been difficult for courts to determine whether plans qualify for "fair and equitable" status. Plans that propose selling an encumbered asset free and

clear of liens could be confirmed over the objections of secured creditors so long as the debtor's asset sale complies with Section 363(k) of the Code. Sales comply with Section 363(k) if they permit parties with secured claims to "offset [their] claim against the purchase price of [the asset]" when entering bids to purchase the asset, an arrangement that is popularly referred to as credit bidding.

An increasing number of debtors, however, have begun to seek confirmation of their plans under Subsection (iii) of 1129(b)(2)(A). Because the language used in this provision is both sparse and general, determining whether a reorganization plan can qualify as "fair and equitable" under this subsection is no simple task. As written, the statute does not provide guidance concerning (1) what types of plans fall within Subsection (iii)'s scope or (2) what constitutes the "indubitable equivalent" of a secured creditor's claim. Resolving the first issue is not easy because nothing in the text of Section 1129(b)(2)(A) indicates whether subsection (iii) can be used to confirm every type of reorganization plan or only those plans that fall outside the scope of Subsections (i) and (ii). Resolving the second issue is difficult because "indubitable equivalent" is not a term that has been defined by the Code or the courts. *In re Pacific Lumber, Co.*, 584 F.3d 229, 246 (5th Cir. 2009) (noting that "[w]hat measures constitute the indubitable equivalent of the value of the [secured creditor's] collateral are rarely explained in case law").

Two of our sister circuits recently issued opinions analyzing Section 1129(b)(2)(A). *Philadelphia Newspapers*, 599 F.3d 298; *Pacific Lumber*, 584 F.3d 229. In *Pacific Lumber*, the Fifth Circuit held that a plan that proposed the sale of the debtor's encumbered assets to a specified purchaser for an amount equal to the judicially-determined value of the assets qualified as "fair and equitable" under Subsection (iii) of Section 1129(b)(2)(A). *Pacific Lumber*, 584 F.3d at 249. In *Philadelphia Newspapers*, the Third Circuit held, in a 2-1 decision with one of the members of the majority concurring in the judgment, that a plan that proposed selling the debtor's encumbered assets free and clear of liens in an auction where credit bidding would not be allowed could qualify as "fair and equitable" under Subsection (iii). *Philadelphia Newspapers*, 599 F.3d at 318. Both majority opinions held that Subsection (iii)'s scope was not limited by its neighboring subsections and that the proceeds from the sale of encumbered assets constituted the indubitable equivalent of the secured creditors' claims. Judge Ambro's dissent in *Philadelphia Newspapers* rejected both of these conclusions, arguing that the majority's reading of the statute was at odds with the text of the statute itself, various canons of statutory interpretation, the statute's legislative history, interests expressed in other parts of the Code and the settled expectations of lenders and borrowers.

(2) The Plain Language of Section 1129(b)(2)(A) Does Not Clearly Authorize Confirmation of the Debtors' Reorganization Plans

With this background information in mind, we can begin our analysis of Section 1129(b)(2)(A)'s meaning in earnest. When attempting to decipher the proper interpretation of a statute, we begin by determining "whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). When interpreting statutory language, the meaning attributed to a phrase "depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S.Ct. 1325, 1330 (2011); *see also United States v. Webber*, 536 F.3d 584, 593 (7th Cir. 2008) (stating that "we give words their ordinary meaning unless the context counsels otherwise"). If we find that the language in a statute is unambiguous, we will not conduct further inquiry into its meaning and enforce the statute in accordance with its plain meaning. *BedRoc, Ltd. v. United States*, 541 U.S. 176, 183 (2004); *Ind. Forest Alliance, Inc. v. United States Forest Serv.*, 325 F.3d 851, 857 (7th Cir. 2003). Thus, the first step we must take in resolving this appeal is determining whether the language of Section 1129(b)(2)(A) unambiguously authorizes the confirmation of

reorganization plans such as those proposed by the Debtors under Subsection (iii).

The Debtors contend that the plain language of Section 1129(b)(2)(A) orders courts to approve any cramdown plan—including those that propose selling encumbered assets free and clear of liens—that satisfies Subsection (iii)'s requirement that the plan provides secured creditors with the indubitable equivalent of their claims. They also argue that the statute's language unambiguously indicates that a plan that provides a secured creditor with the proceeds from the sale of an asset at an auction that does not permit credit bidding satisfies the indubitable equivalence requirement. In support of their positions, the Debtors cite the majority's decision in *Philadelphia Newspapers*, reiterating many of the arguments articulated in that case.[1] Unsurprisingly, the Lenders disagree with the Debtors' claims, arguing that cramdown plans that seek to sell encumbered assets free and clear of liens must satisfy Subsection (ii)'s requirements and that the Debtors' proposed sales would not provide the Lenders with the indubitable equivalent of their claims. The Lenders contend that Judge Ambro's dissent in *Philadelphia Newspapers* provides a superior analysis of Section 1129(b)(2)(A).

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[1] Given that the Debtors' assets in this case have not gone through the judicial valuation process and the Debtors' reorganization plans involve using an auction to determine the assets' current value, it is clear that *Philadelphia Newspapers* is more relevant precedent than *Pacific Lumber*.

We reject the Debtors' contentions for two reasons. First, like the bankruptcy court, we find the statutory analysis articulated by Judge Ambro in his *Philadelphia Newspapers* dissent to be compelling. Nothing in the text of Section 1129(b)(2)(A) directly indicates whether Subsection (iii) can be used to confirm any type of plan or if it can only be used to confirm plans that propose disposing of assets in ways that can be distinguished from those covered by Subsections (i) and (ii).[5] Hence, there are two plausible interpretations of the statute: one that reads Subsection (iii) as having global applicability and one that reads it as having a much more limited scope. *See Philadelphia Newspapers*, 599 F.3d at 324-27 (Ambro, J., dissenting). Because, at this stage of our analysis, we are limited to considering the plain text of the statute and "reasonable minds can differ on the interpretation of Section 1129(b)(2)(A) as it applies to plan sales free of liens," we find that the statute does not have a single plain meaning. *Id.* at 322. Accordingly, we must look beyond the text of Section 1129(b)(2)(A) to determine which of its possible interpretations is the correct

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[5] We disagree with the *Philadelphia Newspapers* majority's conclusion that the use of "or" in Section 1129(b)(2)(A) resolves this issue. *Philadelphia Newspapers*, 599 F.3d at 305-06. While Section 102(5) of the Code indicates that "or" should be understood in the term's non-exclusive sense, several exceptions to this rule have been recognized. *See Philadelphia Newspapers*, 599 F.3d at 324 (Ambro, J., dissenting); Lawrence P. King et al., 2 *Collier on Bankruptcy* ¶ 102.06 (16th ed. Rev. 2011). Hence, the mere presence of the term "or" is insufficient to resolve this issue.

one. Second, we find that, even if we analyze Subsection (iii) of Section 1129(b)(2)(A) in isolation, the text of the provision does not unambiguously indicate that plans such as those proposed by the Debtors qualify for "fair and equitable" status. Subsection (iii) states that a reorganization plan can be confirmed over the objections of secured creditors if it provides the creditors with the "indubitable equivalent" of their claims. What constitutes the "indubitable equivalent" of a creditor's secured claim depends on the amount of the creditor's lien and the current value of the secured asset. If a creditor's claim is oversecured, then the indubitable equivalent of the creditor's claim is its face value. For instance, where a creditor has a $100,000 lien on an asset worth $500,000, a reorganization plan will only give the creditor the indubitable equivalent of its claim if it gives it something worth $100,000 (e.g., that amount in cash or a replacement lien for that amount on another asset). If a creditor's claim is undersecured, then the indubitable equivalent of the creditor's secured claim equals the current value of the asset. For instance, where a creditor has a $100,000 lien on an asset that has depreciated in value and is now worth less than $100,000, a reorganization plan will give the creditor the indubitable equivalent of its claim if the plan gives the creditor something worth the asset's current market value.

Determining the value of an undersecured creditor's claim is problematic because it is usually difficult to discern the current market value of the

types of assets that are sold in corporate bankruptcies. The Code recognizes two basic mechanisms for solving these types of valuation problems: judicial valuation of an asset's value, 11 U.S.C. § 506(a)(1), and free market valuation of an asset's value as established in an open auction, 11 U.S.C. §§ 363(k), 1129(b)(2)(A). The Debtors argue that, because their proposed plans would sell their assets at an open auction and the Lenders would receive the proceeds from these sales, the free market will determine the assets' current values and the Lenders will receive the indubitable equivalent of their secured claims.

The Debtors' argument is flawed, however, because of the incongruity between the auctions proposed in the plans and those recognized elsewhere in the Code. In order to auction off an encumbered asset free and clear of liens under Sections 363(k) or 1129(a)(2)(B)(ii), for instance, the Code requires that parties with secured interests in the assets be permitted to credit bid. By granting secured parties this ability, the Code provides lenders with means to protect themselves from the risk that the winning auction bid will not capture the asset's actual value. If a secured lender feels that the bids that have been submitted in an auction do not accurately reflect the true value of the asset and that a sale at the highest bid price would leave them undercompensated, then they may use their credit to trump the existing bids and take possession of the asset. In essence, by granting secured creditors the right to credit bid, the Code promises

lenders that their liens will not be extinguished for less than face value without their consent. This protection is important since there are number of factors that create a substantial risk that assets sold in bankruptcy auctions will be undervalued.[6]

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[6] Multiple factors contribute to the risk that an asset will be undervalued in such sales. First, the speed and timing of a bankruptcy auction often results in undervaluation. Lorie R. Beers, *Preparing the Distressed Company for Sale*, Am. Bankr. Inst. J. 44, 45 (Aug. 26, 2007). Second, and closely related, is the inability to provide sufficient notice to interested parties. *See id.* at 69 (explaining that because of financial constraints, the development of formal marketing materials and notice to prospective buyers is often abbreviated, resulting in a shorter list of interested parties and thereby reducing the chance that the sale will result in full realization of the asset's value). Third, there is an inherent risk of self-dealing on the part of existing management. We have recognized that existing management may have an incentive to favor "white knight" bidders favorably disposed to preserving the existing business over others who might enter higher bids. *See Dynamic Corp. of Am. v. CTS Corp.*, 805 F.2d 705, 711 (7th Cir. 1986). Fourth, while the credit markets are more recently showing signs of repair, they remain in a state of limited liquidity. Liquidity constraints are likely to keep many potential bidders on the sidelines, greatly reducing the chance that competitive bidding will occur. Finally, the fact that bidders must expend their resources when putting together a bid and are likely to take these costs into consideration when setting the value of their bids increases the chance that the asset's sale price will not reflect its actual value. *See* Vincent S. J. Buccola & Ashley C. Keller, *Credit Bidding and the Design of Bankruptcy Auctions*, 18 Geo. Mason L. Rev. 99, 121 (2010) (noting that an estate is unlikely to realize the entire value of an asset because bids will take into account the bidders' financing costs).

Because the Debtors' proposed auctions would deny secured lenders the ability to credit bid, they lack a crucial check against undervaluation. Consequently, there is an increased risk that the winning bids in these auctions would not provide the Lenders with the current market value of the encumbered assets. Nothing in the text of Section 1129(b)(2)(A) indicates that plans that *might* provide secured lenders with the indubitable equivalent of their claims can be confirmed under Subsection (iii). Hence, we find that a plain-meaning reading of Subsection (iii)'s text does not establish that it can be used to confirm plans that propose auctioning off a debtor's encumbered assets free and clear of liens without allowing credit bidding.

(3) The Better Interpretation of Section 1129(b)(2)(A)(iii) Does Not Permit Confirmation of the Debtors' Reorganization Plans Under Subsection (iii)

Because the text of Section 1129(b)(2)(A) suggests more than one plausible understanding of the statute, we must apply well-established principles of statutory interpretation to determine which of these understandings is superior. In general, canons of statutory construction urge courts to interpret statutes in ways that make every part of the statute meaningful. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Interpretations that result in provisions being superfluous are highly disfavored. *Id.* Further, when deciding between competing understandings of a statute, courts often consider

the objectives of the larger statutory scheme and select the meaning that "produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988); *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004).

The Debtors' proposed interpretation of Section 1129(b)(2)(A) violates a cardinal rule of statutory construction. One of the basic tenets that courts follow when interpreting ambiguous text states that "a statute ought . . . to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174 (2001). The first two Subsections of 1129(b)(2)(A) set forth the specific conditions that reorganization plans that seek to sell encumbered assets in particular manners must meet. Subsection (i) sets forth requirements that apply to all plans where the debtor seeks to retain possession of or sell an encumbered asset with the liens attached. Subsection (ii) sets forth requirements that apply to all plans that seek to sell an encumbered asset free and clear of liens. The Debtors propose that we should read Subsection (iii) as stating that any plan that satisfies a general requirement—the indubitable equivalence standard—should be granted "fair and equitable" status. Under their interpretation, plans could qualify for treatment under Subsection (iii) even if they seek to dispose of encumbered assets in the ways discussed in Subsections (i) and (ii), but fail to meet these Subsections' requirements.

This understanding of Section 1129(b)(2)(A)(iii) is unacceptable because it would render the other subsections of the statute superfluous.[7] If, as the Debtors propose, Subsection (iii) permits a debtor to sell an asset free and clear of liens without permitting credit bidding, then it is difficult to see what, if any, significance Subsection (ii) can have. Similarly, the Debtors' interpretation would permit properly-designed reorganization plans to sell encumbered assets without satisfying the conditions set forth in Subsection (i). We cannot conceive of a reason why Congress would state that a plan must meet certain requirements if it provides for the sale of assets in particular ways and then immediately abandon these requirements in a subsequent subsection.[8] The infinitely more

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[7] This interpretation would also violate the canon of statutory construction that states that when "there is an inescapable conflict between general and specific . . . provisions of a statute, the specific will prevail." Norman J. Singer & J.D. Shambie Singer, 2A *Sutherland Statutes & Statutory Construction* § 46:5; *see also Bloate v. United States*, 130 S.Ct. 1345, 1354 (2010) (stating that "general language of a statutory provision, although broad enough to include [a matter], will not be held to apply to a matter specifically dealt with in another part of the same enactment"). Allowing plans to use Subsection (iii) to accomplish a sale free of liens without according lenders the procedural protections prescribed by clause (ii) "places the two clauses in conflict" and would allow the general to subsume the specific. *In re Philadelphia Newspapers*, 559 F.3d at 329 (Ambro, J., dissenting).

[8] Indeed, the legislative history for Section 1129(b)(2)(A) indicates that Subsection (iii) was intended to apply to plans that propose treating the estate's encumbered assets in ways that are different from those covered by Subsection (i) and (ii).

plausible interpretation of Section 1129(b)(2)(A) would read each subsection as stating the requirements for a particular type of sale and "construing each of the [] subparagraphs . . . [as conclusively governing] the category of proceedings it addresses." *Bloate v. United States*, 130 S. Ct. 1345, 1355 (2010). Under such a reading, plans could only qualify as "fair and equitable" under Subsection (iii) if they proposed disposing of assets in ways that are not described in Subsections (i) and (ii).

Also counseling against the Debtors' interpretation of Section 1129(b)(2)(A)(iii) is the fact that it treats secured creditors' interests in a way that sharply conflicts with the way that these interests are treated in other parts of the Code. A review of the "sections of the Code related to plan sales of encumbered property free of its liens, as well as sections concerning the protection afforded to secured creditors," reveals that the Code has an expressed interest in insuring that secured creditors are properly compensated. *Philadelphia Newspapers*, 599 F.3d at 331 (Ambro, J., dissenting). For instance, Sections 363(k) and 1129(b)(2)(A)(ii) provide a secured creditor with the right to credit bid whenever a debtor attempts to sell the asset that

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In re Philadelphia Newspapers, 559 F.3d at 335-36 (Ambro, J., dissenting) (reviewing the congressional record and noting that neither of the examples of plans that a court could confirm under clause (iii)—abandonment of the encumbered asset or providing the secured creditor with a replacement lien on similar collateral— overlap with plans that could be confirmed under Subsections (i) and (ii)).

secures its debt free and clear of its lien. *Id.* Similarly, Section 1111(b) provides secured creditors with means to protect their claims when a debtor seeks to retain possession of an encumbered asset. *See In re 680 Fifth Ave. Assocs.*, 29 F.3d 95, 97-98 (2d Cir. 1994); Lawrence P. King et al., *7 Collier on Bankruptcy* ¶ 1111.03 (16th ed. Rev. 2011). In contrast, the Code does not appear to contain any provisions that recognize an auction sale where credit bidding is unavailable as a legitimate way to dispose of encumbered assets. Because the Debtors' interpretation of Section 1129(b)(2)(A) would not provide secured creditors with the types of protections that they are generally accorded elsewhere in the Code, their interpretation is less plausible than a construction of the statute that reads Subsection (ii), which offers the standard protections to creditors, as providing the only way for plans seeking to sell encumbered assets free and clear of liens to obtain "fair and equitable" status. *Philadelphia Newspapers*, 599 F.3d at 331 (Ambro, J., dissenting).

Because the Debtors' suggested reading of Subsection (iii) would nullify its neighboring subsections and ignore the protections for secured creditors recognized in other Code provisions, we reject their interpretation of the statute. Instead, we find that the Code requires that cramdown plans that contemplate selling encumbered assets free and clear of liens at an auction satisfy the requirements set forth in Subsection (ii) of the statute.

III. Conclusion

For these reasons, the ruling of the bankruptcy court is

AFFIRMED

In the
United States Court of Appeals
for the Seventh Circuit

In the Matter of:
RIVER ROAD HOTEL PARTNER, LLC,
RIVER ROAD EXPANSION PARTNERS, LLC,
RADLAX GATEWAY HOTEL, LLC and
RADLAX GATEWAY DECK, LLC,

v.

AMALGAMATED BANK

Appeals from the United States Bankruptcy Court
for the Northern District of Illinois,
Eastern Division,
Nos 09-B-30029 & 09-B-30047

The Honorable Bruce W. Black,
Bankruptcy Judge Presiding

Oral Argument - Filed 04/07/2011

VICTORIA COURT REPORTING SERVICE, INC.
312-443-1025

* * *

gets teed up, it will get litigated whether something satisfies the standard. Uh, so I don't think so, but I don't think we have to decide that to decide whether (a)(ii) is the sole method Congress has provided for uh --

JUDGE CUDAHY: The courts that have gone against you have pretty much started with the proposition that this a plain meaning term.

MR. LEWIS: They, they have. And I, and I, and as I argued here at the outset –

JUDGE CUDAHY: If that's not right, then we've got problems.

MR. LEWIS: And that's my point. It was where I started here.

JUDGE HAMILTON: In essence, you're asking us to send this issue to the Supreme Court.

MR. LEWIS: Well that depends on --

JUDGE HAMILTON: We have, you're asking, to agree with you, we've got to create a circuit split.

MR. LEWIS: I, I, I'm not asking you to create a circuit split, I'm asking, Your Honor, to affirm below. That may be the consequence, Mr. Neff can probably tell you that more than I, it'll be in his

hands if you affirm, uh, but uh, yeah, that might well the be outcome

* * *

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Chapter 11

Case No. 09 B 30047
(Jointly Administered)

Hon. Bruce W. Black

In re:	)
	)
RADLAX GATEWAY HOTEL, LLC, *et al.*,	)
	)
Debtors.	)

CERTIFICATION FOR DIRECT APPEAL TO COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Pursuant to 28 U.S.C. § 158(d)(2)(B)(i) and Bankruptcy Rule 8001(f)(2)(A)(i), and at the request of the debtors, RADLAX GATEWAY HOTEL, LLC, *et al.*, the bankruptcy court certifies that the appeal in this matter meets the requirements of 28 U.S.C. § 158(d)(2)(A)(i), (ii), and (iii) for direct appeal to the court of appeals.

This chapter 11 case and *In re River Road Hotel Partners, LLC*, No. 09 B 30029, are nearly identical cases. The debtors have the same counsel, filed their petitions for relief on the same date, have many of the same creditors, and both cases involve distressed hotel properties. The cases have been administered concurrently with the parties involved filing virtually identical motions in each. The cases have also maintained corresponding hearing schedules. In short, these are sister cases.

On June 4, 2010, the debtors in the two cases filed substantively identical motions to approve bid procedures. The bankruptcy court entered an order denying that motion on October 5, 2010, citing the reasons stated in an order issued the same date in *River Road Hotel Partners*. The debtors in both cases have now filed motions requesting the bankruptcy court to certify the appeal directly to the court of appeals.

As these are sister cases and the reasons for certifying the appeal directly to the court of appeals are the same, the bankruptcy court certifies the appeal in this case for direct appeal to the court of appeals for the reasons stated in this courts certification issued in *In re River Road Hotel Partners, LLC*, No. 09 B 30029, entered November 4, 2010.

Dated: November 4, 2010

/s/
Hon. Bruce W. Black
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Chapter 11

Case No. 09 B 30029
(Jointly Administered)

Hon. Bruce W. Black

In re:	)
	)
RIVER ROAD HOTEL,	)
PARTNERS, LLC, *et al.*,	)
	)
Debtors.	)

CERTIFICATION FOR DIRECT APPEAL TO COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Pursuant to 28 U.S.C. § 158(d)(2)(B)(i) and Bankruptcy Rule 8001(f)(2)(A)(i), and at the request of the debtors, River Road Hotel Partners, LLC, *et al.*, the bankruptcy court certifies that the appeal in this matter meets the requirements of 28 U.S.C. § 158(d)(2)(A)(i), (ii), and (iii) for direct appeal to the court of appeals.

Background

1. This appeal arises out of a chapter 11 bankruptcy case filed on August 17, 2009.[1] On June 4, 2010, the debtors filed their chapter 11 plan, which contemplated the auction sale of substantially all of their assets, including the InterContinental Hotel Chicago O'Hare. On the same date the debtors filed a motion seeking approval of procedures to govern the sale. The motion included a request to preclude the debtors' secured creditors from credit bidding,[2] both as a matter of law under 11 U.S.C. 1129(b)(2)(iii) and for cause, a matter of fact, under 11 U.S.C. § 363(k).

2. After orally denying that portion of the motion seeking to preclude credit bidding as a matter of law, the bankruptcy court conducted an evidentiary hearing on the issue of cause and found that cause did not exist to preclude credit bidding.

3. On October 5, 2010, the bankruptcy court entered a written order denying the motion. The debtors had based their legal argument on the

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[1] For the same reasons set forth in this certification, the bankruptcy court is also certifying the chapter 11's sister case, *In re RADLAX GATEWAY HOTEL, LLC, et al.*, No. 09 B 30047, directly to the court of appeals. A separate certification will be issued in *RADLAX GATEWAY*.

[2] Credit bidding as defined by § 363(k) is the ability of a secured lender to offset its claim against the purchase price of the property. *See* 11 U.S.C. § 363(k); 3 *Collier on Bankruptcy* ¶ 363.09 (Alan N. Resnick & Henry J. Sommers eds., 16th ed. 2010).

majority opinion in *In re Philadelphia Newspapers, LLC*, 599 F.3d 289 (3d Cir. 2010). The bankruptcy court declined to follow that opinion, finding the dissenting opinion of Judge Ambro persuasive. The debtors have appealed the decision.[3]

Discussion

4. The debtors' appeal satisfies all of the criteria in 28 U.S.C. § 158(d)(2)(A) for direct appeal to the court of appeals.

5. First, the appeal satisfies the first clause of section 158(d)(2)(A)(i) because the bankruptcy court's order denying preclusion of credit bidding under 11 U.S.C. § 1129(b)(2)(A)(iii) raises a question of law on which there is no controlling decision of the Court of Appeals for the Seventh Circuit or of the Supreme Court of the United States.

6. Second, the appeal satisfies the second clause of section 158(d)(2)(A)(i) because the determination whether to permit credit bidding at auction sales in bankruptcy court is a matter of public importance. Under current economic conditions a large portion of chapter 11 cases involving commercial real property progress to a sale of assets rather than to reorganization, and many of those sales involve lenders who are owed more than

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[3] The debtors do not seek review of that part of the October 5, 2010, order in which the court found that the debtors had not established cause to preclude credit bidding under 11 U.S.C. § 363(k).

the property is worth. Whether such lenders can credit bid is crucial to the outcome of the sales. As a result, this issue has received significant attention among bankruptcy commentators.[4]

7. Third, the appeal satisfies section 158(d)(2)(A)(ii) because the appeal involves a question of law requiring resolution of conflicting decisions. In addition to *Philadelphia Newspapers*, two other reported decisions conflict with the bankruptcy court's order here. *See In re The Pacific Lumber Co.*, 584 F.3d 229, 246 (5th Cir. 2009); *In re CRIIMI MAE, Inc.*, 251 B.R. 796, 806-07 (Bankr. D. Md. 2000).

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[4] *See, e.g.*, Erik W. Anderson & Joshua J. Lewis, The Impact of Philadelphia Newspapers on a Secured Creditor's Right to Credit Bid, XXIX Am. Bankr. Inst. J., 376, March 2010; Benjamin D. Feder, Plain Meaning Trumps Long Standing Commercial Lender Expectations in Third Circuit Philadelphia Newspapers Decision, BANKRUPTCY LAW INSIGHTS, March 31, 2010, http://www.bankruptcylawinsights.com/2010/03/articles/distressed-ma-1/plain-meaning-trumps-long-standing-commercial-lender-expectations-in-third-circuit-philadelphia-newspapers-decisons/; Stephen J. Lubben, The Chapter 11 Challenge to Delaware, October 5, 2010, 1:18 pm, THE NEW YORK TIMES DEALBOOK BLOG, http://dealbook.blogs.nytimes.com/2010/10/05/the-chapter-11-challenge-to-delaware/; Benjamin D. Feder, Credit Bidding After Philadelphia Newspapers: Dissent 1, Majority 0, BANKRUPTCY LAW INSIGHTS, October 29, 2010, http://www.bankruptcylawinsights.com/2010/10/articles/distressed-ma-1/credit-bidding-after-philadelphia-newspapers-dissent-1-majority0/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+BankruptcyLawInsights+%28Bankruptcy+Law+Insights%29.

8. Fourth, the appeal satisfies section 158(d)(2)(A)(iii) because an immediate appeal will materially advance the progress of this case by settling whether the debtors may proceed with their proposed chapter 11 plan, "or whether they must instead pursue reorganization through one or more alternative plans." Debtors' Motion for Certification at ¶ 10 (Oct. 14, 2010). Notwithstanding the debtors' reference to alternative resolutions, the huge difference between the value of the real estate and the amounts owed the lenders,[5] the proposed sale precluding credit bidding appears to this bankruptcy judge to be the only realistic hope the debtors have to confirm a plan in chapter 11.

For these reasons, the bankruptcy court certifies the appeal in this case for direct appeal to the court of appeals.

Dated: November 4, 2010

/s/
Hon. Bruce W. Black
U.S. Bankruptcy Judge

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[5] The principal secured lender, Amalgamated Bank, is owed in excess of $161,000,000. Claims No. 6-1, 15-1, and 136-1. Although the debtor has not provided an estimated value of the property the proposed stalking horse bid was a mere $42,000,000. Debtors' Motion to Approve Bid Procedures ¶ 16, Dkt. 309, filed June 4, 2010.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Chapter 11

Case No. 09 B 30047
(Jointly Administered)

Hon. Bruce W. Black

In re:	)
	)
RADLAX GATEWAY HOTEL, LLC, *et al.*,	)
	)
Debtors.	)

Debtors' Motion for an Order: (A) Approving Procedures for the Sale of Substantially All of the Debtors' Assets; (B) Scheduling an Auction; (C) Approving Assumption and Assignment Procedures; (D) Approving Form of Notice; and (E) Granting Related Relief is Denied.

STATEMENT

This matter is before the court on the Debtors' Motion for an Order: (A) Approving Procedures for the Sale of Substantially All of the Debtors' Assets; (B) Scheduling an Auction; (C) Approving

Assumption and Assignment Procedures; (D) Approving Form of Notice; and (E) Granting Related Relief filed June 4, 2010. The Debtors in *In re River Road Hotel Partners, LLC, et al.*, 09 B 30029, filed a nearly identical motion on the same date. This court held a joint evidentiary hearing on the motions on August 23, 2010. For the reason stated in this Court's order entered October 5, 2010, *In re River Road Hotel Partners, LLC, et al.*, 09 B 30029, the Debtors' Motion is DENIED.

Dated: October 5, 2010

/s/
Hon. Bruce W. Black
United States Bankruptcy
Judge

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Chapter 11

Case No. 09 B 30029
(Jointly Administered)

Hon. Bruce W. Black

In re:	)
	)
RIVER ROAD HOTEL,	)
PARTNERS, LLC, *et al.*,	)
	)
Debtors.	)

Debtors' Motion for an Order: (A) Approving Procedures for the Sale of Substantially all of the Debtors' Assets; (B) Scheduling an Auction; (C) Approving Assumption and Assignment Procedures; (D) Approving Form of Notice; and (E) Granting Related Relief is Denied.

STATEMENT

Order Denying Debtors' Bid Procedures Motion

This matter is before the court on the *Debtors' Motion for an Order: (A) Approving Procedures for the Sale of Substantially all of the Debtors' Assets; (B) Scheduling an Auction; (C) Approving Assumption and Assignment Procedures; (D) Approving Form of Notice; and (E) Granting Related Relief* filed on June 4, 2010. The motion seeks, among other things, an order approving bid procedures that deny the secured creditors the ability to credit bid. The Debtors believe that they can prevent credit bidding by proceeding under section 1129(b)(2)(A)(iii) of the Bankruptcy Code[1], or in the alternative, for cause under sections 1129(b)(2)(A)(ii) and 363(k).

Amalgamated Bank[2] and the Federal Deposit Insurance Corporation[3] (referred to collectively as the "Lenders"), object to the motion. They argue that section 1129(b)(2)(A)(ii) is the exclusive means

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[1] 11 U.S.C. § *ff*. Any reference to "section" or "the Code" is a reference to the Bankruptcy Code unless another reference is stated.

[2] Amalgamated Bank is acting as Trustee of Longview Ultra Construction Loan Investment Fund, f/k/a/ Longview Ultra I Construction Loan Investment Fund, in its capacity as the administrative agent for itself and San Diego National Bank, now part of U.S. Bank N.A. Amalgamated Bank should not be confused with the Amalgamated Bank of Chicago. The two are different entities.

[3] The FDIC is acting as receiver for San Diego Nation Bank. San Diego National Bank was closed on October 30, 2009, and the FDIC was appointed receiver. The FDIC sought to intervene by motion on July 29, 2010. An agreed order was entered on August 9, 2010, granting the FDIC's motion to intervene in connection with the current bid procedures motion.

to sell the Debtors' assets free and clear of liens under section 1129(b)(2)(A), and, as such, the Debtors can only deny the right to credit bid for cause. They believe the Debtors have not sustained this burden and therefore credit bidding must be allowed. This court agrees with the Lenders.

I. Use of section 1129(b)(2)(A)(iii) to Circumvent Credit Bidding

The Debtors, relying heavily on the Third Circuit's recent opinion in *In re Philadelphia Newspapers, LLC*, 599 F.3d 289 (3rd Cir. 2010), first seek to preclude credit bidding by proceeding under section 1129(b)(2)(A)(iii), as opposed to section 1129(b)(2)(A)(ii).[4] Section 1129(b)(2)(A)(iii) does not expressly provide the secured creditors with the right to credit bid. The majority in *Philadelphia Newspapers* approved the Debtors' proposed interpretation of section 1129(b)(2)(A)(iii). This court, however, finds Judge Ambro's well-reasoned dissent in *Philadelphia Newspapers* more persuasive. The Debtors, therefore, may not use section 1129(b)(2)(A)(iii) to sell their assets free and clear of liens. The Debtors must comply with the specific requirements of section 1129(b)(2)(A)(ii).

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[4] The bid procedures' provision on credit bidding states: "The Plan Sale is being conducted under sections 1123(a) and (b) and 1120(b)(2)(A)(iii) of the Bankruptcy Code, and not section 363 of the Bankruptcy Code. As such, no holder of a lien on any assets of the Debtors shall be permitted to credit bid pursuant to section 363(k) of the Bankruptcy Code." Proposed Order, Addendum I, Docket Entry 356 (7/15/10).

II. No Cause Shown to Deny Credit Bidding

The Debtors next seek to suppress the secured creditors' right to credit bid under sections 1129(b)(2)(A)(ii) and 363(k). Pursuant to section 363(k), a secured creditor may credit bid up to the total amount of its allowed claim at a sale under 363(k) unless "the court for cause orders otherwise." 11 U.S.C. 363(k). Section 363 gives courts the discretion to decide what constitutes "cause" and the flexibility to fashion an appropriate remedy by conditioning credit bidding on a case-by-case basis. *See In re NJ Affordable Homes Corp.*, 2006 WL 2128624, 16 (Bankr.D.N.J.,2006) *citing In re 222 Liberty Assocs.*, 108 B.R. 971, 979 (Bankr. E.D. Pa. 1990); *Aetna Realty Invs., Inc. v. Monarch Beach Venture* (In re Monarch Beach Venture, Ltd.)166 B.R: 428, 433 (C.D. Cal. 1993).

On August 23, 2010, this court held an evidentiary hearing for the Debtors to establish cause to deny credit bidding. The Debtors asserted that the Lenders should be barred from credit bidding because: (1) the Lenders' actions caused the Debtors to fail; (2) allowing the Lenders to credit bid will chill the bidding process; and (3) there are still millions of dollars in mechanics' liens that are currently being litigated in state court. None of these alleged circumstances, nor any combination of them, constitute cause sufficient to justify denying the Lenders' right to credit bid at an auction.

First, the Debtors believe that the Lenders' actions caused the Debtors to fail. .The Debtors,

however, did not assert, nor did the evidence show, that the Lenders breached their contracts or acted with any sort of intent to harm the Debtors. The Lenders were trying to protect their interests. Even in the event that the actions the Lenders took to protect their interests did in someway accelerate the Debtors' failures, it does not constitute cause to deny credit bidding in this court's judgment.

Second, the Debtors argue that allowing credit bidding will chill other potential bids. The potential to chill the bidding process has been recognized as a reason to deny credit bidding. *See* 3 *Collier on Bankruptcy* ¶ 363.09[1] (Alan N Resnick & Henry J. Sommers eds., 16th ed.). The Debtors, however, did not provide any specific evidence to show this assertion to be true in this case. Instead, the Debtors were content to assert that credit bidding generally chills the bidding process. Such an assertion, without any evidence showing that credit bidding will chill the process in this case, does not satisfy the Debtors' burden.

Finally, the Debtors' believe that the Lenders should not be allowed to credit bid because the amount and priority of the mechanics' liens against the property have not been resolved. Section 363, however, allows this court to alleviate this concern by placing conditions upon a secured creditor's right to credit bid without denying the right altogether. *See In re NJ Affordable Homes Corp.*, 2006 WL 2128624, 16 (Bankr.D.N.J. 2006). For example, courts have required secured creditors to put cash in escrow, pay a portion of the bid in cash, or furnish a

letter of credit when the amount and validity of an alleged senior lien is in dispute. *See In re Octagon Roofing*, 124 B.R. 522, 526 (Bankr. N.D. Ill. 1991); *In re Diebart Bancroft*, 1993 WL 21423, *5 (E.D.. La. Jan. 26, 1993). In this instance, a similar condition on credit bidding appears to be warranted to ensure that all mechanics' liens that are senior to the Lenders are protected.

III. Conclusion

The Debtors may not use section 1129(b)(2)(A)(iii) to circumvent the Lenders' right to credit bid. Additionally, the Debtors did not show sufficient cause to deny credit bidding under 1129(b)(2)(A)(ii) and 363(k). The Debtors' motion is, therefore, DENIED.

Dated: October 5, 2010

/s/
Hon. Bruce W. Black
United States Bankruptcy
Judge

OPPOSITION BRIEF

No. 11-166

In The
Supreme Court of the United States

RADLAX GATEWAY HOTEL, LLC AND
RADLAX GATEWAY DECK, LLC, PETITIONERS

v.

AMALGAMATED BANK

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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OCTOBER 18, 2011

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held, as a predicate question, that it had jurisdiction over this interlocutory appeal despite petitioners' abandonment of the plan ruled on by the bankruptcy court.

2. Whether under 11 U.S.C. § 1129(b)(2)(A)(iii) a Chapter 11 plan may sell at auction the collateral of a dissenting impaired secured creditor free and clear of the creditor's liens without permitting the creditor to credit bid as provided in 11 U.S.C. § 1129(b)(2)(A)(ii).

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INTRODUCTION

Contrary to petitioners' assertion, the petition presents nothing more than a shallow and academic division between the Third and Seventh Circuits over a narrow question of bankruptcy law—whether a secured creditor must be allowed to credit bid (i.e., bid the debt it is owed instead of cash) when a debtor's property is sold at auction under 11 U.S.C. § 1129(b)(2)(A). Far from being an entrenched division, the two rulings on either side of this conflict arose only in the last 18 months. There is no reason to believe that this conflict will not be resolved in the courts of appeals. Indeed, the complete absence of any court of appeals' decisions construing Section 1129(b)(2)(A)(ii) and (iii) during the first *three* decades since its enactment counsels strongly against this Court's immediate review. This is precisely the sort of question that should percolate in the federal appellate courts before this Court's review.

Moreover, and in any event, this case is a poor vehicle to resolve petitioners' question presented. The actual bankruptcy plan and bid procedures covered by the bankruptcy court's order can no longer be implemented, as they were abandoned and key terms expired. That was the only order over which the Seventh Circuit had appellate jurisdiction on this interlocutory appeal. Yet the Seventh Circuit nevertheless rejected respondent's contention that the appeal was moot. That predicate question of mootness—which itself is not certworthy—would have to be reviewed by this Court *before* it could reach the proper interpretation of 11 U.S.C. § 1129(b)(2).

If the question petitioners present is as important and recurring as they claim, this Court can review it in a future, suitable case. The court below correctly resolved that question here. This petition should be denied.

STATEMENT

A. Statutory Framework

1. The Bankruptcy Code provides that, when property encumbered by a lien is to be sold, a secured creditor holding the lien must be afforded certain protections. Among those protections, the secured creditor has the presumptive right under 11 U.S.C. § 363(k) to place what is commonly referred to as a "credit bid" for the property. A credit bid allows the secured creditor to bid for the property using the debt it is owed to offset the purchase price. Section 363(k) provides that "unless the court for cause orders otherwise," the holder of a "lien that secures an allowed claim" may "bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property." 11 U.S.C. § 363(k). A secured creditor may credit bid up to the full face amount of its claim even if the claim amount exceeds the value of the collateral (that is, even if the secured creditor is "undersecured"). *Cohen v. KB Mezzanine Fund II, LP (In re SubMicron Sys. Corp.)*, 432 F.3d 448, 459-460 (3d Cir. 2006).

The right to credit bid under Section 363(k) is well-recognized as an important check against the

undervaluation of collateral at sale in bankruptcy. *See, e.g.*, 7 COLLIER ON BANKRUPTCY, ¶ 1111.03[4] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2010). A number of factors may cause a price obtained at the auction of collateral to be undervalued. Pet. App. 20a n.6. For example, quick timing and insufficient notice or marketing may result in potentially interested purchasers being unaware of the sale. Additionally, the debtor's existing management may stand to benefit if the assets are sold at a discount to an insider (or a buyer that includes an insider) who will preserve the existing business. *Gandal v. Telemundo Group, Inc.*, 997 F.2d 1561, 1562 (D.C. Cir. 1993); *Dynamic Corp. of Am. v. CTS Corp.*, 805 F.2d 705, 711 (7th Cir. 1986); Pet. App. 20a n.6. Credit bidding obviates many of these risks. If the secured creditor believes that it could generate a greater return on the collateral than that represented by the bidder's offer, then the secured creditor may bid up to the full amount of its claim toward the purchase price. At the same time, credit bidding does no harm to other creditors, since every penny of a cash bid would have to go into the secured creditor's pocket until that secured creditor has been paid in full. For the very same reason, preventing credit bidding does not benefit any other creditors or the debtor (though it may benefit the debtor's insiders); only when the stalking horse bid exceeds the secured creditor's full claim will there be any cash for any other creditors, let alone for the debtor.

2. Section 1129 governs the confirmation of Chapter 11 plans. 11 U.S.C. § 1129. One requirement for confirmation is that, for each class of claims or interests, "such class has accepted the plan" or "is not impaired under the plan." 11 U.S.C. § 1129(a)(8). Section 1129(b) provides an exception to that requirement, permitting the debtor to "cram down" the plan over the objections of an impaired class. To invoke the cramdown provision, the plan must "not discriminate unfairly, and [be] fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." 11 U.S.C. § 1129(b)(1).

For a plan to be "fair and equitable" with respect to a class of secured claims,[1] the plan must satisfy Section 1129(b)(2)(A). That provision includes three methods—each set forth in a distinct subsection—for meeting the "fair and equitable" requirement.

Under subsection (i), the plan may provide that the secured creditors "retain the liens" and receive full payment of the claim through revised payment terms at a market rate of interest. *Id.* § 1129(b)(2)(A)(i) ("deferred cash payments totaling at least the allowed amount of such claims").

Under subsection (ii), the plan may provide for the sale of the property free and clear of liens, as long

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[1] Each secured claim normally is placed in a class by itself. *Brady v. Andrew (In re Commercial W. Fin. Corp.)*, 761 F.2d 1329, 1338 (9th Cir. 1985).

as the secured creditor is allowed to credit bid under Section 363(k). *Id.* § 1129(b)(2)(A)(ii) (allowing "the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale").

Under subsection (iii), the plan may provide "for the realization by [the secured creditors] of the indubitable equivalent of [their] claims." *Id.* § 1129(b)(2)(A)(iii). Examples include surrendering the property to the creditor or providing suitable substitute collateral (also known as a replacement lien). 7 COLLIER ON BANKRUPTCY ¶ 1129.04[2][c] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2010).

Petitioners here seek to invoke subsection (iii) to "cram down" a plan over the objection of respondent, an impaired secured creditor, with a plan that provides for the sale of encumbered property free and clear of liens but does not allow for Section 363(k) credit bidding, as required by clause (ii).

B. Factual Background

Petitioners RadLAX Gateway Hotel, LLC and RadLAX Gateway Deck, LLC own and operate a Radisson Hotel and an adjacent, incomplete parking structure near the Los Angeles International Airport. Petitioners obtained a $142 million loan in 2007 to purchase the property, renovate the hotel, and build the parking structure. Pet. App. 3a-4a.

Respondent Amalgamated Bank is the trustee of lender Longview Ultra Construction Loan Investment Fund, in its capacity as administrative agent for itself and co-lender U.S. Bank National Association. *Id.* at 4a, 41a n.2. U.S. Bank National Association is successor-in-interest to the Federal Deposit Insurance Corporation, as receiver for San Diego National Bank. *Id.* at 41a nn.2-3.

To secure the 2007 loan to petitioners, the lenders obtained a blanket lien on all of petitioners' assets. Bankr. Ct. Dkt. 235 at 6.

During construction of the parking facility, petitioners incurred substantial construction overruns. In 2009, petitioners exhausted their committed funding from the lenders and were unable to secure additional funding or restructuring of the loan. Pet. App. 4a.

Petitioners filed for relief under Chapter 11 in August 2009. As of the filing of the bankruptcy petition, petitioners owed more than $120 million on the loans, with over $1 million in interest accruing each month. *Id.* at 4a-5a.

C. Proceedings Below

1. Bankruptcy court

Petitioners submitted for confirmation a reorganization plan in which they proposed to sell at auction substantially all of their assets free and clear of the liens. *Id.* at 5a. Petitioners also submitted proposed

bid procedures to govern the sale of their assets at the plan auction. Petitioners proposed to sell their assets to a stalking horse bidder for only $47.5 million, subject to a higher bid at auction. *Id.* at 5a-6a.[2] Harp Group, Inc., an entity owned and controlled by petitioners' principal, Peter G. Dumon, was a minority-interest owner of the stalking horse bidder. If the stalking horse bidder were to prevail at the auction, the existing management company would continue managing the hotel. That management company also is owned and controlled by Dumon. Bankr. Ct. Dkt. 206 at 7.

Petitioners' proposal would have precluded the lenders from protecting their interests by credit bidding at the auction. Respondent, as the lenders' administrative agent, objected to petitioners' proposed bid procedures. Pet. App. 6a.

The bankruptcy court rejected petitioners' bid procedures because they did not allow for credit bidding. The court held that petitioners "may not use [the indubitable equivalence standard of] section 1129(b)(2)(A)(iii) to sell their assets free and clear of liens." *Id.* at 42a. Rather, to auction their assets free and clear, petitioners "must comply with the specific requirements of section 1129(b)(2)(A)(ii)," which

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[2] A stalking horse bid is an initial bid on a debtor's assets from an interested buyer chosen by the debtor. *Contrarian Funds LLC v. Aretex LLC (In re WestPoint Stevens, Inc.)*, 600 F.3d 231, 239 n.3 (2d Cir. 2010).

provides for credit bidding under Section 363(k). *Ibid.* After a trial, the court also concluded that there was no "cause" to deny credit bidding under Section 363(k), rejecting, among other theories, the petitioners' claims that the respondent and the other lender committed some kind of wrongdoing in the administration of the loan. *Id.* at 43a.

Petitioners appealed, and the bankruptcy court certified the appeal directly to the Seventh Circuit under 28 U.S.C. § 158(d)(2)(B)(i) and Rule 8001(f)(2)(A)(i) of the Bankruptcy Rules. *Id.* at 30a.

The asset purchase agreement between petitioners and the stalking horse bidder established various milestones, several of which have not been met during the pendency of the appeal. Each missed milestone affords the stalking horse bidder the right to terminate the agreement. Bankr. Ct. Dkt. 283, § 4.4, at 18-19. Petitioners also acknowledged that the stalking horse bid was worth many millions of dollars less than respondent's claim, and that petitioners therefore would not attempt to confirm the proposed plan. C.A. Dkt. 18 at A-7 to A-8; Bankr. Ct. Dkt. 402-1, at 13-14.

2. Proceedings in the court of appeals

The Seventh Circuit unanimously affirmed the bankruptcy court.

The court first rejected respondent's argument that the issue on appeal was moot. The court based that conclusion on petitioners' filing of an amended asset purchase agreement that "largely resembled" the agreement that was submitted with the original reorganization plans. Pet. App. 8a. The court further concluded that, even if the original plan were based on asset purchase agreements that had expired, this appeal fit within the exception to mootness for cases that, "due to timing issues, would otherwise evade review." *Ibid.*

On the merits, the court of appeals rejected petitioners' argument that Section 1129(b)(2)(A)(iii) permits a cramdown plan to auction collateral free and clear of liens without credit bidding. *Id.* at 16a-17a. The court concluded that Section 1129(b)(2)(A)(ii) governs all sales of property free and clear of liens and that subsection (iii) "can only be used to confirm plans that propose disposing of assets in ways that can be distinguished from those covered by Subsections (i) and (ii)." *Id.* at 17a.

As the court of appeals explained, under petitioners' proposed interpretation, "plans could qualify for [confirmation] under Subsection (iii) even if they seek to dispose of encumbered assets in the ways discussed in Subsections (i) and (ii), but fail to meet these Subsections' requirements." *Id.* at 22a. But that "understanding of Section 1129(b)(2)(A)(iii) is unacceptable because it would render the other subsections of the statute superfluous." *Id.* at 23a. And it would "place[] the two clauses in conflict" and "allow

the general [i.e., clause (iii)] to subsume the specific [i.e., clause (ii)]," contravening a canon of statutory construction. *Id.* at 23a n.7 (internal quotations omitted).

The court of appeals noted that there would be no reason for Congress to "state that a plan must meet certain requirements if it provides for the sale of assets in particular ways and then immediately abandon those requirements in a subsequent subsection." *Id.* at 23a. Thus, the "infinitely more plausible interpretation" is that each clause "stat[es] the requirements for a particular type of sale" and "'conclusively govern[s] the category of proceedings it addresses.'" *Id.* at 23a-24a (brackets omitted) (quoting *Bloate v. United States*, 130 S. Ct. 1345, 1355 (2010)).

Moreover, the court of appeals reasoned that petitioners' interpretation "treats secured creditors' interests in a way that sharply conflicts with the way that these interests are treated in other parts of the Code." *Id.* at 24a. "Sections 363(k) and 1129(b)(2)(A)(ii) provide a secured creditor with the right to credit bid whenever a debtor attempts to sell the asset that secures its debt free and clear of its lien." *Id.* at 24a-25a. "By granting secured parties this ability [to credit bid], the Code provides lenders with means to protect themselves from the risk that the winning auction bid will not capture the asset's actual value." *Id.* at 19a. "If a secured lender feels that the bids that have been submitted in an auction do not accurately reflect the true value of the asset

and that a sale at the highest bid price would leave them uncompensated, then they may use their credit to trump the existing bids and take possession of the asset." *Ibid.* Thus, "the Code promises lenders that their liens will not be extinguished for less than face value without their consent." *Id.* at 19a-20a. Accordingly, the court concluded that petitioners' interpretation "would not provide secured creditors with the types of protections that they are generally accorded elsewhere in the Code." *Id.* at 25a.

Petitioners did not move to stay issuance of the mandate. The case is now proceeding in the bankruptcy court.

REASONS THE PETITION SHOULD BE DENIED

A. The Petition Presents Only A Shallow And Academic Disagreement Between The Third And Seventh Circuits

1. As the Seventh Circuit recognized, the divided Third Circuit's ruling in *In re Philadelphia Newspapers, LLC*, 599 F.3d 298 (3d Cir. 2010), conflicts with the decision below. But the mere existence of this narrow conflict hardly warrants this Court's immediate intervention; rather, it is a recent anomaly that may be resolved in the courts of appeals.

Both the Third and Seventh Circuit decisions are a recent development in bankruptcy law. Since the Bankruptcy Code was enacted in 1978, *see* Pub. L. No. 95-598, 92 Stat. 2635 (1978), *no* court of appeals

construed the interplay between Section 1129(b)(2)(A)(ii) and (iii) until 2009. As Judge Ambro recognized in his dissent, "few in the first 30 years of Bankruptcy Code jurisprudence read" that provision to permit the auction of collateral free and clear of liens while precluding credit bidding. *Philadelphia Newspapers*, 599 F.3d at 319 (Ambro, J., dissenting).

Indeed, bankruptcy commentators have described the Third Circuit's ruling as novel and unexpected. Far from reflecting a persistent conflict in the courts of appeals that might compel the Court's review, commentators have described *Philadelphia Newspapers* as a "surprise" reading of the Bankruptcy Code "over 30 years after enactment of § 1129(b)." Ralph Brubaker, *Cramdown of an Undersecured Creditor Through Sale of the Creditor's Collateral: Herein of Indubitable Equivalence, the § 1111(b)(2) Election, Sub Rosa Sales, Credit Bidding, and Disposition of Sale Proceeds*, 29 NO. 12 BANKR. L. LETTER 1, 7 (2009); *see also* Vincent S. J. Buccola and Ashley C. Keller, *Credit Bidding and the Design of Bankruptcy Auctions*, 18 GEO. MASON L. REV. 99, 100 (2011) ("Until very recently," the right to engage in "credit bidding was not in jeopardy, as bankruptcy courts had virtually no authority to enjoin the practice" under the prevailing law.). Novel rulings—like that of the Third Circuit—are precisely the type of decisions that often are revisited by a court of appeals the second time around. Until the already-divided Third Circuit has had an opportunity to reconsider *Philadelphia Newspapers* in light of the Seventh Circuit's

express rejection of its decision, review by this Court would be premature.

The so-called "persistence" of the two-court conflict is belied by the few decisions addressing the issue, and the fact that neither court yet has been presented with an opportunity to revisit its ruling. Petitioners also are incorrect that the question presented will evade review. The rapid succession of decisions on the precise question presented—two rulings in the past 18 months—disproves petitioners' assertion that this case presents a "rare opportunity" to review the question. Pet. 14. If the issue is as important as petitioners contend, this Court will have opportunities in the future to address it.

2. Petitioners attempt to bolster the shallow split with the Fifth Circuit's decision in *In re Pacific Lumber Co.*, 584 F.3d 229 (5th Cir. 2009). But they cannot show that the outcome would have been different in that court of appeals than in the court below. As the Seventh Circuit recognized (Pet. App. 16a n.4), *Pacific Lumber* has little relevance to the present dispute. Indeed, the Fifth Circuit held that the precise question at issue here had not been preserved, as there was no challenge to the absence of an auction. The Fifth Circuit's decision thus creates no conflict warranting this Court's review.

In contrast to this case, *Pacific Lumber* involved a fair and equitable determination where the value of the collateral was decided by the bankruptcy court in a *judicial valuation* rather than by a sale by auction

without credit bidding. Moreover, the case was on review following plan confirmation—when the precise valuation of the collateral had been determined—rather than in the interlocutory posture of this dispute.

In *Pacific Lumber*, the bankruptcy court held a hearing at which it "heard extensive valuation testimony" including from "eight valuation experts." 584 F.3d at 238, 248. The court valued the collateral at $510 million, and the reorganization plan proposed to pay that amount in cash to the secured creditor. *Id.* at 238-239, 246-247. The Fifth Circuit held that Section 1129(b)(2)(A) did not foreclose judicial valuation and payment in full of the secured creditor's claim because it would give the debtor the indubitable equivalent of its claim. *Id.* at 245-246. "Whatever uncertainties exist about indubitable equivalent, paying off secured creditors in cash can hardly be improper if the plan accurately reflected the value of the Noteholders' collateral." *Id.* at 247.

Moreover, the Fifth Circuit acknowledged that the credit bidding might be "imperative in some cases" under Section 1129(b)(2)(A)(ii)—such as when the sale (and thus the property's valuation) is done by auction. *Id.* at 246. But whether an auction was required for the valuation of the collateral in that case—and thus whether there needed to be credit bidding in an auction—was not before that court. As the Fifth Circuit explained, the creditors had failed to preserve—and thus had waived—any challenge to the absence of an auction. *Id.* at 247 ("[Creditors] have

not challenged on appeal the court's finding that they will receive more value under the [judicial valuation] than they could have received in * * * a foreclosure auction.").

After 30 years of no circuit precedent on the meaning of Section 1129(b)(2)(A)(ii) and (iii), only a few appellate court decisions address the propriety of a sale of collateral by auction without permitting credit bidding. Rather than intervene now to address an issue in its infancy, this Court should permit the issue to percolate in the courts of appeals.

B. Review Is Unwarranted Because Resolution Of The Shallow Conflict Will Not Affect The Outcome Of Most Disputes

In any event, the issue does not warrant this Court's review because its resolution will have no bearing on the resolution of most bankruptcy asset sales.

The decision below, as well as that of the Third Circuit, affect a clear minority of bankruptcy cases. Most asset sales in bankruptcy do not occur under the cramdown provisions of Section 1129. In the ordinary course, the trustee sells the assets under 11 U.S.C. § 363. As commentators have recognized, "[t]he holding in *Philadelphia Newspapers* will likely have a limited impact on asset sales in bankruptcy because most asset sales occur during the case under § 363, which permits credit-bidding." Gregory F. Pesce, *The Irrelevance of* Philadelphia Newspapers, 8 AM. BANKR.

INST. LITIG. COMM. NEWS, NO. 3 (May 2011). Because "assets are rarely sold off as part of a plan of reorganization" under Section 1129, there is "little to suggest that [any conflict] will have a major impact on how asset sales occur in bankruptcy cases." *Ibid.*

Moreover, the insignificance of the question presented is underscored by the fact that most secured lenders can replicate the result of the ruling below even where credit bidding is prohibited at auction. At an asset sale without credit bidding, secured creditors in the Third Circuit can still bid using—in essence—their secured claim. Rather than credit bid per se, a secured creditor can bid cash, which should "be returned to the lender, producing the same result as if it had credit bid." Brad B. Erens & David A. Hall, *Secured Lender Rights in 363 Sales and Related Issues of Lender Consent*, 18 AM. BANKR. INST. L. REV. 535, 562 (2010). Indeed, that is what happened in *Philadelphia Newspapers*: "the lenders who were denied the right to credit bid ultimately prevailed at auction in any case by submitting the highest cash bid at auction." *Id.* at 562-563.

C. This Case Is Not A Suitable Vehicle To Resolve The Conflict

Petitioners' cramdown plan was based entirely on an asset purchase agreement in which its stalking horse bidder would purchase (subject to higher bids) the property at auction. But since the bankruptcy court certified this case to the Seventh Circuit, that

plan has become no longer viable and has been abandoned by petitioners.

That abandonment makes this case a particularly poor vehicle to review petitioners' question presented for two reasons. First, to resolve that question, the Court would have to review the Seventh Circuit's predicate ruling that the issue sought to be reviewed is not moot, despite the absence of an operative plan. Second, even if not moot, the case is not suitable for review because the only proposed plan before the Court is outdated and could not be implemented even if revived by this Court.

1. The Seventh Circuit incorrectly held the issue was not moot and this Court would have to decide and affirm that ruling to reach the merits

The bankruptcy court certified for interlocutory appeal its order rejecting the bid procedures in petitioners' proposed cramdown plan and asset purchase agreement. Because that particular plan is no longer viable, the appeal should have been dismissed as moot. *United States v. Juvenile Male*, 131 S. Ct. 2860 (2011).

Contrary to the Seventh Circuit's holding, petitioners' submission of a new plan that "largely resembled the agreement that was submitted in connection with the original reorganization plans" did not preserve the Seventh Circuit's jurisdiction over the dispute. Pet. App. 8a. An interlocutory appeal

under 28 U.S.C. § 158(d)(2) is treated like a certified question under 28 U.S.C. § 1292(b). *E.g.*, *Wilborn v. Wells Fargo Bank, N.A. (In re Wilborn)*, 609 F.3d 748, 752 (5th Cir. 2010). Just as in Section 1292(b), the scope of an appeal under Section 158(d)(2) is the specific "judgment, order, or decree" certified for appeal and issues fairly included within it. *United States v. Stanley*, 483 U.S. 669, 677 (1987); *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205 (1996). Here, the bankruptcy court's order denying the specific bid procedures of the original reorganization plan was the only order certified for interlocutory appellate review. Pet. App. 31a. So the Seventh Circuit's jurisdiction was limited, as is this Court's, to that "certified order." *Stanley*, 483 U.S. at 677; *Yamaha Motor*, 516 U.S. at 205.[3]

Because the plan the bankruptcy court reviewed has been abandoned, the interlocutory appeal seeking approval of the bid procedures in that plan has become moot. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) ("It has long been settled that a federal court has no authority 'to give opinions

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[3] Section 158(d)(2) was recently added in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1233(a), 119 Stat. 23, 202-203. Very few courts have addressed this provision. But to address petitioners' question presented, this Court would have to decide the scope of appellate review when a bankruptcy court certifies, and a court of appeals accepts, an order for interlocutory review under 28 U.S.C. § 158(d)(2). That question is not independently worthy of this Court's review, and, in any event, it is premature to address this jurisdictional issue given the paucity of judicial authority on it.

upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895))). Moreover, because the new plan does not fall within the scope of the certified order, the Seventh Circuit was without appellate jurisdiction to rule on it. Thus, the court of appeals could not have approved that new plan as meeting the indubitable equivalent requirement of 11 U.S.C. § 1129(b)(2)(A)(iii), nor could it have reinstated the original plan that had been abandoned. Neither could this Court.

The court of appeals also was wrong that this case can be decided because it is capable of repetition while evading review. Pet. App. 7a-9a. That exception requires the action's duration to be too short to be fully litigated. *Juvenile Male*, 131 S. Ct. at 2865. As the Third Circuit's resolution of *Philadelphia Newspapers* shows, bid procedures in cramdown plans can be drafted so that the opportunity to confirm them will not expire before completion of appellate review. To be sure, the plan here expired before the completion of appellate proceedings, but it did not do so out of necessity. Rather, petitioners' own actions (submission of the original plan nearly a year into the case, and submission of a superseding plan) and design (drafting the original plan so that it would expire if certain benchmarks were not met) caused the plan to expire. Bankr. Ct. Dkt. 283, § 4.4, at 18-19, § 8.2(g), at 30. Petitioners thus are responsible

for their being in jeopardy of not being positioned to proceed to confirmation with their new plan in time to prevent confirmation of a creditor-proposed plan or relief from the automatic stay of 11 U.S.C. § 362(a) and foreclosure by respondent. Indeed, the Bankruptcy Code gave petitioners a period of at least 180 days in which they had the *exclusive* right to propose and obtain confirmation of such a plan. 11 U.S.C. § 1121(c)(3). Their failure to do so is insufficient to fall within the mootness exception.

2. *In any event, the absence of a viable plan makes this a poor vehicle for review*

Even if not moot, the absence of a viable plan that could be reviewed and reinstated by this Court strongly counsels against review.

If petitioners were correct (and they are not) that some cramdown plans that do not permit credit bidding at auction could nevertheless be confirmable under Section 1129(b)(2)(A)(iii) as providing the "indubitable equivalent," the answer to that question would turn on the specifics of the given plan. Even in the Third Circuit, "indubitable" means "not open to question or doubt." *Philadelphia Newspapers*, 599 F.3d at 310 (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY 1154 (1971)). Thus, as the divided Third Circuit acknowledged, the indubitable equivalent of the lenders' claim is "the unquestionable value of [the] lender's secured interest in the collateral." *Ibid.* For a proposed cramdown plan to meet that standard,

the bid procedures *collectively* must be designed to provide the "indubitable equivalen[ce]."

Here, there no longer is an actual, viable plan before this Court to review. This Court should not determine the question presented by petitioners in a vacuum. Even if petitioners' theory of the statutory scheme were correct, the overall procedures of a plan would be vital to determine whether the plan could meet the "indubitable equivalent" standard. As the court below recognized, there are a "number of factors that create a substantial risk that assets sold in bankruptcy auctions will be undervalued." Pet. App. 20a. Of particular concern is that "existing management may have an incentive to favor 'white knight' bidders favorably disposed to preserving the existing business over others who might enter higher bids." *Id.* at 20a n.6.

Moreover, a plan that precludes credit bidding but has an initial stalking horse bid that is *greater* than the secured creditors' claims is far different from a plan without credit bidding where the stalking horse bid is less than both the secured creditors' liens and the market value of the property.[4] And the

---

[4] In the case of the oversecured creditor credit bidding at auction, the creditor would bid cash in addition to the value of its secured claim. As the court below explained, "[w]hat constitutes the 'indubitable equivalent' of a creditor's secured claim depends on the amount of the creditor's lien and the current value of the secured asset." Pet. App. 18a. For an oversecured claim, "the indubitable equivalent of the creditor's claim is its face value. For instance, where a creditor has a $100,000 lien on

(Continued on following page)

timing and notice provided by the bid procedures can significantly affect the likelihood that an auction will determine the actual market value of the property, *ibid.*—which amounts to the indubitable equivalent of the claim where, as here, the secured creditor is undersecured. *Id.* at 18a ("If a creditor's claim is undersecured, then the indubitable equivalent of the creditor's secured claim equals the current value of the asset.").

3. *Even if the Court were to grant review and agree with petitioners' legal theory, it would not alter the judgment below*

In this case, even if the Court were to review the expired asset purchase plan, it would not result in reversal of the judgment below. That is further reason to deny review.

The abandoned plan's bid procedures did not provide respondent with the "indubitable equivalent" of its claim. Because respondent has a lien on substantially all of petitioners' assets, the value of the secured claim is the lesser of the amount of the debt ($120 million) or the value of petitioners' property. Petitioners' stalking horse bidder has offered to pay only $47.5 million for the property. *Id.* at 6a. But that significantly undervalues the true worth of the

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an asset worth $500,000 a reorganization plan will only give the creditor the indubitable equivalent of [the creditor's] claim if it gives it something worth $100,000." *Ibid.*

property. Indeed, petitioners acknowledged that the stalking horse bid was a floor, not the actual value, and that it was far less than their own appraisals. C.A. Dkt. 18 at A-7 to A-8; Bankr. Ct. Dkt. 402-1 at 12-14. Moreover, petitioners have conceded that the property is worth significantly more than the stalking horse bid, and for that reason have abandoned that plan, which is the one the bankruptcy court and the Seventh Circuit reviewed. C.A. Dkt. 18 at A-7 to A-8; Bankr. Ct. Dkt. 402-1 at 13-14.

To be sure, the property still *could* fetch more than the stalking horse bid at auction if the defunct plan were somehow resurrected. But that does not mean that the plan itself provides the secured creditor the "indubitable equivalent" of its claim. Indeed, the Third Circuit might reach a different result on these facts: it was not confronted with bid procedures where the minimum bid was *less* than what even the debtors believed the property to be worth.

D. The Decision Below Is Correct

Review also is unwarranted because the Seventh Circuit's ruling is correct. Notably, both of the amici supporting certiorari would urge affirmance if this Court were to grant plenary review. There is no need for such review of a correct decision. To the extent the shallow two-court division persists or expands, the Court should defer review until another court of appeals agrees with the Third Circuit.

1. The statutory text gives the secured creditor the presumptive right to credit bid

The text of Section 1129(b)(2)(A) gives secured lenders a presumptive right to credit bid when a cramdown plan proposes to sell collateral free and clear of liens. Section 1129(b)(2)(A)(ii) provides that when "the plan provides * * * for the sale * * * of any property that is subject to the liens securing such claims, free and clear of such liens," then the sale must be "subject to section 363(k)." 11 U.S.C. § 1129(b)(2)(A)(ii). Section 363(k) guarantees the secured creditor the right to credit bid at the auction "unless the court for cause orders otherwise." *Id.* § 363(k).

Petitioners' argument that a cramdown plan involving the sale of assets need not include credit bidding is based solely on the word "or" in Section 1129(b)(2)(A). But statutory construction is a "holistic endeavor." *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988).

Examining the text of the statute as a whole, Section 1129(b)(2)(A) contains three clauses, each of which governs exclusively where it is applicable. As Judge Ambro explained, the three clauses provide "distinct routes that apply specific requirements depending on how a given plan proposes to treat the claims of secured creditors." *Philadelphia Newspapers*, 599 F.3d at 325 (Ambro, J., dissenting); Pet. App. 22a-23a. The requirements of clause (i) govern

where the plan proposes that the secured creditors "retain the liens." 11 U.S.C. § 1129(b)(2)(A)(i). Clause (ii) governs where the plan proposes "the sale * * * of any property that is subject to the liens securing such claims, free and clear of such liens." *Id.* § 1129(b)(2)(A)(ii). Clause (iii) applies where the plan proposes a situation not covered in clause (i) or (ii) but that will give the debtor the "indubitable equivalent" of its claim. *Id.* § 1129(b)(2)(A)(iii). Clause (iii) is "not designed to supplant clauses (i) and (ii) where they plainly apply." 599 F.3d at 326 (Ambro, J., dissenting); Pet. App. 24 ("[P]lans could only qualify as 'fair and equitable' under Subsection (iii) if they proposed of disposing the assets in ways that are not described in Subsections (i) and (ii).").

That result is consistent with two fundamental rules of statutory construction, both of which are violated by petitioners' reading. First, as the court below observed, "when 'there is an inescapable conflict between general and specific * * * provisions of a statute, the specific will prevail.'" Pet. App. 23a (quoting NORMAN J. SINGER & J.D. SHAMBIE SINGER, 2A SUTHERLAND STATUTES & STATUTORY CONSTRUCTION § 46:5); *see also Bloate v. United States*, 130 S. Ct. 1345, 1354 (2010) ("[g]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment" (quoting *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932))). As the court of appeals concluded, "[a]llowing plans to use Subsection (iii) to accomplish

a sale free of liens without according lenders the procedural protections prescribed by clause (ii) 'places the two clauses in conflict' and would allow the general to subsume the specific." Pet. App. 23a n.7 (quoting *Philadelphia Newspapers*, 599 F.3d at 329 (Ambro, J., dissenting)); *see also Philadelphia Newspapers*, 599 F.3d at 329 (Ambro, J., dissenting) ("It seems Pickwickian to believe that Congress would expend the ink and energy detailing procedures in clause (ii) that specifically deal with plan sales of property free of liens, only to leave general language in clause (iii) that could sidestep entirely those very procedures.").

Second, petitioners' reading "is unacceptable because it would render [clauses (i) and (ii)] superfluous." Pet. App. 23a. It is a "'cardinal principle of statutory construction' * * * that * * * no [provision] 'shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citation omitted). Petitioners' reading violates this principle, because if clause (iii) "permits a debtor to sell an asset free and clear of liens without permitting credit bidding, then it is difficult to see what, if any, significance [clause] (ii) can have." Pet. App. 23a.

2. *Petitioners' interpretation conflicts with other provisions of the Bankruptcy Code*

Denying credit bidding under clause (iii) also would sharply conflict with how other provisions of the Bankruptcy Code treat secured creditors' interests.

Id. at 24a. The Bankruptcy Code was designed to preserve the secured creditor's benefit of its bargain. Jason S. Brookner, Pacific Lumber *and* Philadelphia Newspapers: *The Eradication of a Carefully Constructed Statutory Regime Through Misinterpretation of Section 1129(b)(2)(A) of the Bankruptcy Code*, 85 AM. BANKR. L.J. 127, 142 (2011); *Philadelphia Newspapers*, 599 F.3d at 331 (Ambro, J., dissenting). A key right of a secured creditor under state law is the right to foreclose on the collateral in the case of default. While other provisions of the Bankruptcy Code were specifically enacted to preserve that benefit of the secured creditor's bargain, petitioners' construction of Section 1129(b)(2)(A) would nullify that benefit.

Reflecting Congress' commitment to protecting secured creditors, Section 363 and Section 1111 work in tandem to prevent them from being underpaid, and preclude debtors from speculating on the value of the collateral. Pet. App. 24a-25a; *Philadelphia Newspapers*, 599 F.3d at 333-334 (Ambro, J., dissenting). When collateral is to be sold, Section 363(k) provides a mechanism to preserve the benefit of a secured creditor's collateral by granting the right to credit bid. The creditor may bid up to the entire amount of its allowed claim, and as long as it is not outbid, it can purchase the collateral without any cash out of pocket, which essentially effects a repossession. Credit bidding is useful when a creditor believes the value of its collateral exceeds what would otherwise be obtained at auction. Under Section 1111(b), an undersecured creditor may elect to have its claim

treated as if it were fully secured. If the creditor makes this election, the debtor must either pay the creditor in full or surrender the collateral.

Section 1129(b)(2)(A)(ii) preserves these protections when confirming a cramdown plan that proposes to sell collateral free and clear of liens, by expressly incorporating Section 363(k). As the court of appeals explained, petitioners' interpretation "ignore[s] the protections for secured creditors recognized in other Code provisions." Pet. App. 25a. The court thus correctly rejected that reading. *See Timbers of Inwood Forest*, 484 U.S. at 371 (looking to other provisions of Bankruptcy Code to clarify provision at issue).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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OCTOBER 18, 2011

REPLY BRIEF

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AND
BRIEFS

No. 11-166

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In the Supreme Court of the United States

RADLAX GATEWAY HOTEL, LLC
and RADLAX GATEWAY DECK, LLC,
Petitioners,

v.

AMALGAMATED BANK,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' REPLY BRIEF

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CORPORATE DISCLOSURE

The corporate disclosure statement included in the petition for writ of certiorari remains accurate.

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Reply in Support of Petition for Certiorari

ARGUMENT

Respondent attempts to manufacture a jurisdiction problem by characterizing the case as moot. This argument completely misses the mark. The petition does not ask the Court to determine whether a particular chapter 11 plan may be confirmed, but rather whether Petitioners may pursue an auction sale of assets free of liens using bid procedures that prohibit its secured creditor from credit bidding at the sale. The parties continue to actively contest that important question of law that has split the circuits. The Court's decision will therefore have a concrete impact on the legal rights of the parties going forward. There is an active controversy this Court needs to resolve.

Respondent's vigorous opposition to Petitioners' proposed bid procedures in this case demonstrates that the issue presented is much more than a mere interesting academic question. Respondent concedes that the right to credit bid at a bankruptcy sale of collateral is a vital protection for secured creditors. Whether that right must be provided in any sale under chapter 11 is therefore critically important, affecting billions of dollars in secured debt. The Seventh Circuit's decision below creates a square conflict on this issue with prior decisions by the Fifth and Third Circuits and upsets the uniform application of the Bankruptcy Code. The Court should grant the writ of certiorari and resolve this issue.

I. The Case is Not Moot.

As it did below, Respondent attempts to distract the Court from the important issue presented in this case by raising the specter of mootness. Respondent's mootness argument has been repeatedly rejected by the bankruptcy court and was readily dispatched by the Seventh Circuit. *See* Pet. App. at 7a-9a. The same result should obtain here.

A. There is a live controversy and the parties have a concrete interest in the outcome.

Simply stated, a case is moot only if the issue presented is no longer live or the parties lack a cognizable interest in the outcome. *Powell v. McCormack*, 395 U.S. 486, 496 (1969). The Court has described a legally cognizable interest as "definite and concrete, touching on the legal relations of parties having adverse legal interests . . . a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971).

In this case, there is no doubt that a live controversy exists. Petitioners are still pursuing an auction sale of their assets and the parties continue to vigorously contest whether section 1129(b)(2)(A) of the Bankruptcy Code requires Petitioners to permit Respondent to credit bid at the auction. In recognition of this ongoing dispute, the bankruptcy court has twice refused to lift the automatic stay imposed by 11 U.S.C. § 362(a) while this appeal has been pending—including most recently just two weeks

ago—despite Respondent's contention, *inter alia*, that the appeal is moot. *See* Bankruptcy Dkt. No. 505.

Likewise, the parties have a legally cognizable interest in the outcome of this appeal. If the Court grants review and agrees with Petitioners' interpretation of section 1129(b)(2)(A), Petitioners will implement bid procedures for an asset sale that preclude Respondent from credit bidding. If the judgment of the lower court is affirmed, Petitioners will be required to consider alternative strategies for exiting bankruptcy and Respondent will renew its request for relief from the automatic stay. Accordingly, this controversy "touch[es] on the legal relations of parties having adverse legal interests" and a decision from the Court will provide "specific relief through a decree of a conclusive character" in this bankruptcy case. *Rice*, 404 U.S. at 246.

Respondent attempts to conflate the issue presented to create a mootness problem that does not exist by diverting the Court's attention from the specific bid procedure provision on appeal to the underlying asset purchase agreement and chapter 11 plan. *See, e.g.*, Opp'n at 17-18. The specific order on appeal, however, is the bankruptcy court's denial of Petitioners' motion to establish bid procedures for the sale of collateral because it precludes credit bidding. *See* Pet. App. at 40a-45a. Neither the adequacy of the underlying asset purchase agreement nor the confirmability of Petitioners' chapter 11 plan was before the bankruptcy court or even addressed in the order below. Consequently, neither is at issue in this appeal. The *only* issue before the Court is whether Petitioners may establish bid procedures that preclude Respondent from credit bidding at an auction sale of

collateral under section 1129(b)(2)(A). The Third Circuit recognized the importance of this distinction in *Philadelphia Newspapers*:

> We are asked here not to determine whether the "indubitable equivalent" would necessarily be satisfied by the sale; rather, we are asked to interpret the requirements of § 1129(b)(2)(A) as a matter of law. This distinction is critical.

In re Phila. Newspapers, LLC, 599 F.3d 298, 312-13 (3d Cir. 2010).

In any event, Respondent's contention that Petitioners have "abandoned" their chapter 11 plan is false. As the Seventh Circuit correctly recognized, and as is plain from the continued prosecution of this appeal, Petitioners remain committed to pursuing a chapter 11 plan involving the sale of substantially all their assets without credit bidding as contemplated by the bid procedures motion. To that end, during the appeal process, Petitioners filed an amended asset purchase agreement ("APA") and amended chapter 11 plan, both of which are virtually identical to their predecessors except that (1) the purchase price was increased to account for the appreciation in value of Petitioners' assets during these cases; and (2) the deadlines for approval of the bid procedures motion were extended. *See* Bankruptcy Dkt. No. 428, 429. The proposed stalking horse bidder has not terminated the APA and therefore remains bound by its terms. *See* Bankruptcy Dkt. No. 429 at § 4.4. Consequently, the Seventh Circuit correctly concluded that Petitioners have not abandoned their proposed asset sale:

> It does not appear that the Debtors' reorganization plans suffer from either of the defects—the passing of expiration dates or abandonment—identified by the Lenders.
>
> * * *
>
> [T]he Debtors' statements before this court and the fact that they have filed amended agreements provide convincing evidence that the Debtors have not abandoned their asset sale plans.

Pet. App. at 8a.

Respondent unsuccessfully advanced this same mootness argument three times in the bankruptcy court—once in opposition to a direct appeal to the Seventh Circuit and twice in requests to modify the automatic stay. Each time the bankruptcy court rejected Respondent's argument, recognizing instead that the pending appeal "will materially advance this case by settling whether the debtors may proceed with their proposed chapter 11 plan." Pet. App. at 37a.

The mootness red herring is merely a pretext for Respondent's attempt to insulate a favorable decision from review. *See Erie v. Pap's A.M.*, 529 U.S. 227, 288 (2000) ("Our interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review further counsels against a finding of mootness."). This strategy is further revealed by Respondent's suggestion that the Court should not grant the petition because the Seventh Circuit's decision below was correct. Opp'n at 23. Respondent mischaracterizes the purpose of certiorari, which depends not on the

correctness of the decision being reviewed, but rather the need for resolution of an important issue of law that has divided the circuits. Such is the case here.

B. Even if the case is moot, it fits squarely within the exception to mootness for cases capable of repetition yet evade review.

Even if the passing of certain deadlines in the underlying APA or chapter 11 plan would render this appeal moot, it nonetheless should be reviewed as a case that is capable of repetition, yet evades review due to the inherently short time periods required for a bankruptcy sale. This well-established exception to mootness applies where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same appealing party will be subject to the same action again. *See, e.g., Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007).

As the Seventh Circuit correctly held, Petitioners' appeal readily satisfies both prongs of this exception. *See* Pet. App. at 9a. First, asset sales in bankruptcy typically require short deadlines to protect the parties from market fluctuations, dissipation of value and other unforeseen events. *See* Opp'n. at 3 (recognizing "quick timing and insufficient notice or marketing" attendant with asset sales in bankruptcy). Second, if this petition is denied as moot, Petitioners would simply renew their motion in the bankruptcy court to approve the same bid procedures with a new APA, which would be subject to the same adverse ruling. Consequently, Petitioners would be forced into a position where they could never seek appellate review

of their proposed bid procedures because the inherently short deadlines required for such a sale would inevitably expire before the litigation has run its course. This is precisely the dilemma that the "capable of repetition, yet evading review" exception to mootness is designed to avoid.

Furthermore, if this petition is rendered moot, Petitioners would likely be deprived of any further appellate review of their proposed bid procedures because the bankruptcy court will likely grant Respondent's renewed request for stay relief.

Accordingly, even if there were any merit to Respondent's mootness argument (there is not), the petition fits comfortably within the exception for cases that are capable of repetition, yet evade review.

II. The Issue Presented is of Pressing National Importance.

Despite the significant attention this case has garnered in the bankruptcy community, *see* Pet. at 13 n.1, Respondent attempts to trivialize the issue presented by contending that "its resolution will have no bearing on the resolution of most bankruptcy cases." Opp'n at 15. In support of this argument, Respondent first contends that most debtors will continue to sell assets outside of a plan under section 363, which specifically requires credit bidding. *Id.* at 15-16. That argument is true only when the secured creditor wants its collateral sold (and thus will not credit bid to obtain it). However, it fails when, as here, the secured creditor opposes the sale. In that instance, a debtor's only option is to sell the collateral without credit bidding under section 1129(b)(2)(A)(iii).

Respondent also disparages the importance of credit bidding, claiming that most secured lenders can replicate its protections by bidding cash. *Id.* at 16. This argument contradicts Respondent's vigorous opposition to Petitioners' proposed bid procedures that preclude credit bidding (but permit cash bidding) and Respondent's own description of credit bidding as a "well-recognized" and "important check" against the undervaluation of collateral at bankruptcy sales. *Id.* at 3. Respondent's position is further belied by the two amicus curiae briefs filed in support of the petition, including a brief for the Loan Syndications and Trading Association ("LSTA"), a leading financial trade association. Notably, both amicus curiae disagree with Petitioners on the merits of the issue presented but nonetheless recognize the pressing need for the Court to settle the circuit split regarding the correct interpretation of section 1129(b)(2)(A).

Furthermore, Respondent misconstrues *Pacific Lumber* in an attempt to diminish the extent of the circuit split. *Id.* at 13. However, the issue presented in that case was the exact same issue presented in *Philadelphia Newspapers* and in this case—whether section 1129(b)(2)(A) requires credit bidding whenever there is a sale of collateral free of liens. The Fifth and Third Circuits held that it does not; the Seventh Circuit in this case held that it does. There is a clear and direct split involving all three circuits. Whether the sale is conducted as an auction (as in *Philadelphia Newspapers* and in this case) or as a private sale (as in *Pacific Lumber*) is irrelevant. If the Court were to affirm the Seventh Circuit's decision, it would overrule the holdings in both *Philadelphia Newspapers* and *Pacific Lumber* that a debtor may sell collateral free of

liens without credit bidding under section 1129(b)(2)(A)(iii).

As further evidence of the direct nature of the split, Petitioners' bid procedures were modeled after the bid procedures in *Philadelphia Newspapers* and thus the factual circumstances of these two cases are nearly identical. Although *Pacific Lumber* involved a different type of sale, the majority in *Philadelphia Newspapers* relied heavily on that decision to support its holding that a debtor may sell collateral free of liens without credit bidding under section 1129(b)(2)(A)(iii). *See Phila. Newspapers*, 599 F.3d at 309. Likewise, the Seventh Circuit acknowledged how both the *Philadelphia Newspapers* and *Pacific Lumber* decisions authorize a sale of assets free of liens without credit bidding:

> Two of our sister circuits recently issued opinions analyzing Section 1129(b)(2)(A). . . Both majority opinions held that Subsection (iii)'s scope was not limited by its neighboring subsections and that the proceeds from the sale of encumbered assets constituted the indubitable equivalent of the secured creditors' claims.

Pet. App. at 14a. Consequently, Respondent's contention that *Pacific Lumber* "has little relevance to the present dispute" is unfounded. Opp'n at 13.

Finally, Respondent's characterization of the *Philadelphia Newspapers* and *Pacific Lumber* rulings as "a recent anomaly" and "novel" is misplaced. Opp'n at 11-12. These decisions currently represent the majority view regarding the proper interpretation of

section 1129(b)(2)(A). Furthermore, the impact of these decisions has been significant, especially considering that *Philadelphia Newspapers* is binding precedent for the District of Delaware, where many complex chapter 11 bankruptcy cases are filed. Additionally, the uniquely permissive bankruptcy venue statute provides debtors with great latitude in choosing a jurisdiction in which to file their case. *See* 28 U.S.C. § 1408. As such, the decisions of the Third and Fifth Circuits have broad implications for the future administration of chapter 11 bankruptcy cases.

III. This Case Presents an Ideal Opportunity for the Court to Resolve this Important Issue of Bankruptcy Law.

Respondent urges the Court to delay review of this critical issue of bankruptcy law for another day to allow further percolation in the courts of appeals. *See* Opp'n at 15. However, as both amici point out, this issue has already received extensive treatment in three reported opinions in the Third, Fifth and Seventh Circuits, each of which administers a substantial bankruptcy docket. The arguments on each side of the issue have already been crystallized in carefully reasoned decisions authored by circuit court judges with considerable bankruptcy experience. It is highly unlikely that delaying resolution of this issue further would provide the Court with any additional benefit or insight.

In contrast, denying this petition will likely cause the entrenched circuit split to persist indefinitely. Chapter 11 cases, by their very nature, must be resolved quickly to staunch the loss of value typically associated with a distressed enterprise. In recognition

of this economic reality, the Bankruptcy Code imposes various deadlines to motivate expeditious resolutions. *See, e.g.*, 11 U.S.C. §§ 362(d)(3) (requiring monthly interest payments or stay relief for a secured creditor 90 days after a bankruptcy case involving single asset real estate is filed); 1121(b) (limiting a debtor's exclusive period to propose a chapter 11 plan to 120 days after a bankruptcy case is filed). If a debtor is unable to meet these deadlines or show reasonable progress towards a viable reorganization, the Bankruptcy Code requires the bankruptcy court to modify the automatic stay to allow the secured creditor to pursue its state law rights against the collateral. *See* 11 U.S.C. § 362(d). Consequently, the duration of a typical bankruptcy case is often too short to accommodate full appellate review. *See, e.g., Scotia Pac. Co., LLC v. Official Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229, 241-42 (5th Cir. 2009) (recognizing the lack of "binding appellate precedent in bankruptcy, whose caselaw has been plagued by indeterminacy.").

Furthermore, once a chapter 11 plan is confirmed, appellate review can be complicated and impractical because resolutions in bankruptcy carry immediate financial consequences for a debtor's stakeholders that are difficult—if not impossible—to undo. Accordingly, courts of appeals have long applied the doctrine of "equitable mootness," which counsels against appellate review in bankruptcy cases where certain financial arrangements, such as a chapter 11 plan, have already become effective. *See, e.g., Pac. Lumber*, 584 F.3d at 240 ("'Equitable mootness' has evolved in bankruptcy appeals to constrain appellate review, and potential reversal, of orders confirming reorganization plans. Equitable mootness is a kind of appellate abstention

that favors the finality of reorganizations and protects the interrelated multi-party expectations on which they rest.").

For these reasons, chapter 11 cases are particularly unlikely to receive appellate review, and rarely reach this Court. Consequently, there is real possibility that the issue presented in this appeal—which arises exclusively in a chapter 11 reorganization—may not come before the Court again for some time, if at all. As such, this case presents a unique opportunity for the Court to resolve a significant issue of chapter 11 bankruptcy law over which the circuits are split.

CONCLUSION

The petition should be granted.

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October 28, 2011

AMICUS CURIAE BRIEF

No. 11-166

In The
Supreme Court of the United States

RADLAX GATEWAY HOTEL, LLC, ET AL.,

Petitioners,

v.

AMALGAMATED BANK,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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INTEREST OF *AMICI*

Amici curiae are law scholars who write and teach about bankruptcy and corporate reorganization.[1]

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[1] The parties have consented to the filing of this brief, written evidence of which accompanies the filing. The parties received notice at least 10 days prior to the due date of *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no person (other than *amici curiae* or their counsel) made a monetary contribution intended to fund the preparation or submission of this brief.

Amici have a professional interest in illuminating this Court's consideration of the important and complicated questions this case presents.

SUMMARY OF ARGUMENT

This case presents the question of whether a bankruptcy court may confirm a plan of reorganization that proposes to sell substantially all of the debtor's assets without permitting secured creditors to bid with credit. The courts of appeals are divided two to one over the question, with the Third and Fifth Circuits holding that creditors are not entitled to credit bid and the Seventh Circuit below holding to the contrary. *Amici* urge the Court to grant the petition notwithstanding the somewhat shallow circuit split because: (1) the appellate courts have extensively considered the question presented; (2) the doctrine of "equitable mootness" impedes the development of deeper splits over legal questions concerning plans of reorganization; (3) an unusually permissive venue statute allows debtors to forum shop, increasing the importance of providing a uniform national construction of the Bankruptcy Code; and (4) the answer to the question presented holds billions of dollars in the balance.

ARGUMENT

I. Credit Bidding in the Scheme of Modern Corporate Reorganization

The classical purpose of Chapter 11 is to "empower a debtor with going concern value to reorganize its operations to become solvent once more." *N.C.P. Mktg. Grp., Inc. v. BG Star Productions, Inc.*, 129 S. Ct. 1577, 1577 (2009) (Kennedy, J., statement respecting denial of certiorari). The paradigm of reorganization was the debt-laden railroad of the 19th century. The railroad may have been profitable as a going concern, but cash flows were insufficient to service the sizable debt taken on to finance construction. The railroad's long stretches of track would have been worthless if repossessed and broken apart, and yet no buyer could raise enough capital to purchase the entire enterprise. A restructuring was the only suitable means of maximizing creditor recoveries. It could enable a valuable firm to rework its balance sheet in an orderly fashion, shedding liabilities that could not be timely repaid while providing creditors ownership in a restructured, viable business. *See, e.g.*, DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA (2003).

Modern day financing has worked a sea change in the bankruptcy landscape. Now that multi-billion dollar financings are commonplace, even large debtors can often sell themselves wholesale to an interested buyer. The primary function of Chapter 11 has changed accordingly. Once a legal device to bring

about reorganization, Chapter 11 is now predominately a mechanism by which a distressed debtor auctions off the entire firm, remitting the proceeds of the sale to the various creditor classes. Douglas G. Baird & Robert K. Rasmussen, *Chapter 11 at Twilight*, 56 Stan. L. Rev. 673, 675-76 (2003) (noting that 56% of debtors use Chapter 11 to auction their assets). "In high-stakes cases, bankruptcy judges now serve primarily as auctioneers." Vincent S. J. Buccola & Ashley C. Keller, *Credit Bidding and the Design of Bankruptcy Auctions*, 18 Geo. Mason L. Rev. 99, 99 (2010). The important question that remains is how they should structure the auctions over which they preside in order to maximize creditor recoveries.

The petition for certiorari raises an important and timely issue in this vein: whether secured creditors are entitled to credit bid at bankruptcy auctions. To appreciate the importance of the question presented, a brief explanation of credit bidding is in order. Simply put, "credit bidding involves a secured creditor bidding for a debtor's assets with credit. The debtor owes the creditor a specified sum of money – the credit – and the creditor seeks to buy the asset by extinguishing some or all of that outstanding liability." *Id.* at 102 (providing a detailed mathematical model for credit bidding). Suppose that debtor D owes $100 to secured creditor C, whose security interest extends to D's only asset, a widget. If C values the widget at $60, a credit bid for that price is C's offer to reduce D's $100 liability to $40 ($100 minus $60) in exchange for C taking ownership of the widget. For

all intents and purposes, C is using $60 worth of his $100 credit as cash-equivalent currency at the bankruptcy auction.

As far as the bankruptcy estate is concerned, a winning credit bid replicates the results of a winning cash bid. *Ibid.* Returning to the example above, suppose that C is prohibited from bidding credit. To fund his bid, C must take out a $60 loan from Bank. At auction, C submits a winning $60 cash bid for the widget, remitting the borrowed funds over to D. Now D immediately returns the $60 to C. (As the secured creditor, C has a right to sale proceeds up to the amount of his security interest. 11 U.S.C. § 506(a).) C then uses the $60 to repay his short-lived loan to Bank. Just as in the credit bidding example, the cash-only auction ends with C in possession of the widget and D still in C's debt to the tune of $40. Whether C's payment comes in the form of cash or credit does not affect D's bottom line, and hence does not affect the rights of D's general creditors or other junior claimants. Buccola & Keller, *supra*, at 103-04.

Of course the highly stylized assumptions of the simplistic hypothetical above do not hold in practice. In real-world bankruptcy auctions, credit bidding provides three principal benefits that permit the debtor's assets to sell for the highest possible price.

First, credit bidding offers an effective check against management malfeasance. Not all debtors faithfully discharge their obligation to maximize estate value. Because corporations and the people

who manage them often have misaligned interests, it is hardly implausible that a debtor's officers would seek to sell the bankrupt's business to a low-value bidder in exchange for some personal remuneration that does not redound to the benefit of the enterprise as a whole. The proposed sale in *In re Philadelphia Newspapers, LLC*, 599 F.3d 298, 319-20 (3d Cir. 2010) (Ambro, J., dissenting), may illustrate this very sort of managerial dereliction of duty. Creditors, who bear the costs of a rigged auction, are naturally inclined to prevent inefficient sales. Alan Schwartz, *The Enforceability of Security Interests in Consumer Goods*, 26 J.L. & Econ. 117, 126-27 (1983). Credit bidding helps them do so. In short, the best check against a fixed auction is to increase the stock of knowledgeable bidders interested in purchasing the debtor's collateral.

Second, credit bidding reduces transaction costs. This increases the maximum bid a credit bidder is willing to submit for the assets up for sale. In our hypothetical, we assumed that C could borrow $60 from Bank to bid on the widget, returning the same $60 after winning the auction. In actual practice, banks charge fees and interest. Each dollar C pays in financing costs reduces by a dollar the price he will be willing to bid on the assets the debtor proposes to sell. Buccola & Keller, *supra*, at 121. And reducing the maximum amount a bidder is willing to bid reduces the expected proceeds from an auction.

In the hypothetical, we need only consider the minimal transaction costs on a $60 loan. Unsurprisingly, the stakes are typically higher. In this case, the secured creditors would need to secure $142 million to bid the full amount of their secured claim in cash. (Pet. for Writ of Certiorari at 4.) And the creditors in *Philadelphia Newspapers* and *Pacific Lumber* (the cases that constitute the other side of the circuit split) would have required $300 million and $740 million respectively to bid their debts in cash. *See Philadelphia Newspapers*, 599 F.3d at 301; *In re Pacific Lumber Co.*, 584 F.3d 229, 237 (5th Cir. 2009). Putting together multi-hundred-million dollar loans comes at a cost of millions of dollars in fees and interest. Authorizing credit bidding avoids those costs, increasing the expected proceeds from a bankruptcy auction.

A third benefit of credit bidding is that it increases the pool of knowledgeable bidders participating at a bankruptcy auction, upping competition for the items on the auction block. Increased competition tends to increase the price of the eventual winning bid. Buccola & Keller, *supra*, at 119. Auction optimization theory instructs that the bidders with the highest and second-highest reservation prices will determine the winning sale price. Competition between bidders drives the price of the asset to that of the bidder with the second-highest reservation price, at which point the high-value bidder will submit an incrementally higher topping bid, winning the auction. *See Van Zelst v. Commissioner*, 100 F.3d 1259, 1262 (7th Cir. 1996) ("[T]he market price of an asset

depends on the second-most-productive use to which it can be put."). Barring credit bidding creates risk that the would-be credit bidder will be unable to secure cash financing in time to participate in the bankruptcy auction. And keeping a credit bidder from the auction risks excluding the high-value or second-highest-value bidder, reducing the expected winning price for the debtor's assets.

II. Reasons for Granting the Petition for Certiorari

As a matter of economics, "credit bidding is an unalloyed good" for a debtor's estate. Buccola & Keller, *supra*, at 120. But sound policy and the law do not always mesh. Traditionally, bankruptcy sales were conducted under 11 U.S.C. § 363, which textually assures the right of creditors to credit bid save for "cause." 11 U.S.C. § 363(k). Yet debtors have come to realize that they may also sell all of their assets pursuant to a plan of reorganization under 11 U.S.C. § 1129(b)(2)(A). As petitioners argue, at least one reading of that statutory provision authorizes asset sales without affording a creditor the right to credit bid. 11 U.S.C. § 1129(b)(2)(A)(iii). The correct interpretation of § 1129(b)(2)(A) has divided the Courts of Appeals. The Third and Fifth Circuits have held that the statute does not assure the right to credit bid. *See Philadelphia Newspapers*, 599 F.3d 298; *Pacific Lumber*, 584 F.3d 229. The Seventh Circuit below held squarely to the contrary. Resolving the circuit

conflict over this important question is worthy of the Court's attention. *See* S. Ct. R. 10(a).

Amici will not repeat the argument of the petition for certiorari, which ably describes the split between the courts of appeals. Even when the courts of appeals are divided, however, this Court often elects not to resolve shallow splits. For at least four reasons, *amici* respectfully argue that this petition is grant-worthy notwithstanding the fact that the split only involves three courts of appeals.

First, a reason to deny shallow splits is to permit a question to receive more comprehensive treatment in the lower courts. Courts of appeals often address matters in a cursory or oblique fashion. When that is so, prudence may counsel in favor of permitting an issue to percolate further, enabling this Court to weigh in only after the contours of an issue have crystallized. The benefits of further percolation do not apply here. Between them, the Third, Fifth, and Seventh Circuits have issued four published opinions filling some 78 pages of the Federal Reporter. The decision in *Pacific Lumber* denying the right to credit bid was authored by Chief Judge Jones, a former bankruptcy practitioner who served as one of Chief Justice Rehnquist's appointees to the National Bankruptcy Review Commission. And Judge Ambro penned a dissent in *Philadelphia Newspapers* contending that § 1129 guarantees the right to credit bid at bankruptcy auctions. Like Judge Jones, Judge Ambro is a former bankruptcy practitioner who has authored some of the most important opinions in the

field. *See, e.g.*, *In re Owens Corning*, 419 F.3d 195 (3d Cir. 2005). Awaiting further analysis from other circuits will add negligible value.

Second, bankruptcy cases face unique obstacles to appellate review, obstacles that often preclude the development of deep splits concerning the law of reorganization. Once consummated, plans of reorganization have immediate financial consequences for a debtor's stakeholders: new, publicly traded equity is often issued, old liabilities are discharged, corporate divestitures are implemented, and tax losses are realized. *See, e.g.*, *In re UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994). Undoing the effects of even an erroneously approved plan of reorganization would often prove difficult and highly disruptive. As a result, the courts of appeals have long applied a doctrine, dubbed "equitable mootness," that constrains appellate review of consummated plans. *E.g.*, *In re Pub. Serv. Co.*, 963 F.2d 469, 471-72 (1st Cir. 1992); *In re Manges*, 29 F.3d 1034, 1039 (5th Cir. 1994); *In re Roberts Farms, Inc.*, 652 F.2d 793, 796-97 (9th Cir. 1981); *In re Club Assocs.*, 956 F.2d 1065, 1069 (11th Cir. 1992); *see also UNR Indus.*, 20 F.3d at 769 (explaining that equitable mootness is a doctrine of prudence having nothing to do with the existence of a case or controversy). Whether credit bidding is statutorily assured or not, so-called equitable mootness may deter other appellate courts from reviewing the merits of a plan of reorganization that authorizes (or forbids) the procedure.

Third, due to an unusual ability for debtors to forum shop, it is especially important for the Bankruptcy Code to receive a uniform national construction. Chapter 11 debtors are authorized to file a bankruptcy petition in any district in which they reside, are domiciled, have their principal place of business, hold their principal assets, *or* in which an affiliated entity has commenced a bankruptcy case. 28 U.S.C. § 1408. Most large corporate debtors thus can choose their venue and, with it, their preferred interpretation of the Bankruptcy Code. A debtor determined to deny creditors the right to credit bid will often find it easy to file for bankruptcy in the Fifth or Third (as opposed to the Seventh) Circuit. That is especially so given the large number of companies incorporated in Delaware, which falls within the Third Circuit.[2]

Finally, the question presented by the petition is an important one. The Federal Reserve estimates that American businesses are capitalized with nearly $11 trillion in debt, much of which is secured. *See* http://www.federalreserve.gov/releases/z1/current/z1r-2.pdf (last visited August 14, 2011). And the value of secured debt is determined in significant part by the

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[2] Because most courts have held that a corporate debtor is domiciled where it is incorporated, *see* Michael P. Cooley, *Will Hertz Hurt? The Impact of Hertz Corp. v. Friend on Bankruptcy Venue Selection*, Am. Bankr. Inst. J. 28, 85 (2010) (collecting cases), countless debtors will be able to take advantage of the decision in *Philadelphia Newspapers*.

rights secured creditors enjoy in the event of bankruptcy. *See* Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 Yale L.J. 857, 868 (1982). Whether secured creditors are entitled to credit bid, therefore, "likely holds tens of billions of dollars in the balance." Buccola & Keller, *supra*, at 100. Given the stakes, the Court should not permit even a shallow division between the courts of appeals to persist.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully Submitted,

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September 8, 2011

AMICUS CURIAE BRIEF

No. 11-166

IN THE

Supreme Court of the United States

RADLAX GATEWAY HOTEL, LLC
AND RADLAX GATEWAY DECK, LLC,
Petitioners,

v.

AMALGAMATED BANK,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE LOAN SYNDICATIONS AND TRADING ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

The Loan Syndications and Trading Association (LSTA) is a financial trade association whose mission is to promote a fair, orderly, efficient, and growing corporate loan market and to provide leadership in advancing and balancing the interests of all market participants.[1] Its interest in this case—which involves the treatment of secured creditors whose collateral is auctioned under a Chapter 11 plan—lies in protecting the integrity and efficiency of the bankruptcy process in general and bankruptcy auctions in particular. As a nationwide group with members under the jurisdiction of virtually every federal court of appeals, LSTA has a unique interest in ensuring regularity and predictability throughout the circuits, and in advocating for uniform rules that promote efficient bankruptcy administration.

LSTA participated below as an amicus in support of Respondent, and it believes the Seventh Circuit's decision is correct. Nonetheless, LSTA supports the petition for a writ of certiorari because it agrees with Petitioners that the merits of the question presented are critically important to the bankruptcy system, that there is a square circuit split with carefully reasoned opinions on both sides, and that this case presents a rare and ideal vehicle for resolving that split. Secured creditors' ability to credit bid at auctions of their collat-

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[1] Pursuant to Supreme Court Rule 37.6, counsel for LSTA states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than LSTA or its counsel made a monetary contribution intended to fund the preparation and submission of this brief. Counsel of record for all parties have consented to the filing of this brief. Statements of consent have been submitted to the Clerk.

eral is central to the detailed scheme of protections that the Bankruptcy Code provides them. The Seventh Circuit recognized this and held that the Bankruptcy Code grants secured creditors the right to credit bid. The Third and Fifth Circuits have reached the opposite conclusion. The persistence of an incorrect legal rule in those circuits—and the ongoing uncertainty in other circuits that have not yet spoken on the question—will impose additional risks on secured lenders, raising the cost of capital at a particularly inopportune moment for the national economy. This Court should grant the petition for a writ of certiorari and affirm the decision below.

STATEMENT

I. LEGAL BACKGROUND

This case is about the protections afforded to secured lenders in Chapter 11 bankruptcies—specifically, their right to "credit bid" at sales of their collateral.

Generally speaking, credit bidding allows a secured lender to bid at the sale of its collateral using the outstanding balance on the loan as credit instead of using cash. For example, if a debtor owes $100,000 on a mortgaged warehouse when it seeks Chapter 11 protection, and the debtor or trustee decides to auction the warehouse as part of the bankruptcy process, the mortgage lender may bid up to $100,000 to acquire the warehouse without committing any cash. If the creditor's bid is not the highest bid, it receives the proceeds from the sale; if the secured creditor's bid prevails, it gets the property and offsets its bid against the balance on the loan. *See* 11 U.S.C. §363(k) (providing that a secured lender "may bid at [a] sale [of its collateral], and, if [it] purchases such property, ... may offset [its] claim against the purchase price"). In effect, credit bidding

allows the secured creditor to take possession of its collateral if it believes the property is worth more than does the next highest bidder, without incurring the significant transaction costs associated with preparing and financing a cash bid.

This right is central to Chapter 11's detailed scheme protecting the interests of secured creditors. In general, a Chapter 11 plan may be confirmed only if secured creditors consent or their claims are paid in full. Because that is not always possible, however, the Bankruptcy Code provides that a plan can be confirmed over a secured creditor's objection—"crammed down," in bankruptcy parlance—as long as the plan is "fair and equitable." 11 U.S.C. §1129(b)(2). A plan is "fair and equitable" to secured creditors in three circumstances, laid out in the three subsections of Section 1129(b)(2)(A):

- *First*, under subsection (i), the plan may provide that secured lenders will keep the full value of their liens and receive a stream of payments meeting certain requirements;
- *Second*, under subsection (ii), the plan may provide for the sale of collateral "free and clear" of existing liens and give the proceeds to the secured creditor, but the sale must conform to Section 363(k), which gives secured creditors the right to credit bid; or
- *Third*, under subsection (iii), the plan may provide "for the realization by ... holders [of secured claims] of the indubitable equivalent" of their claims.

See 11 U.S.C. §1129(b)(2)(A)(i)-(iii).

In this case, the debtors proposed a Chapter 11 plan under which they would conduct the kind of asset sale contemplated by subsection (ii) *without* allowing secured lenders to credit bid as subsection (ii) requires, on the theory that the proceeds of the sale might provide the lenders with the "indubitable equivalent" of their claims under subsection (iii). *See* Pet. 5. A divided panel of the Third Circuit had recently approved this theory in *In re Philadelphia Newspapers*, 599 F.3d 298 (3d Cir. 2010), and the debtors modeled their plan directly upon that precedent. *See* Pet. 8-9. But the bankruptcy court found Judge Ambro's dissent in *Philadelphia Newspapers* more persuasive, and rejected the plan as incompatible with subsection (ii). Pet. App. 42a.

Recognizing the importance of the legal question presented, the bankruptcy court certified the issue to the Seventh Circuit. *See* 28 U.S.C. §158(d)(2)(A). The Seventh Circuit affirmed in a fully reasoned opinion, likewise agreeing with the reasoning of Judge Ambro's dissent. The result is a square split between the circuits on the question whether a Chapter 11 plan may provide for the sale of collateral free and clear of existing liens while denying secured creditors the right to credit bid.[2]

II. FACTUAL BACKGROUND

In general, LSTA agrees with Petitioners' statement of the factual background. Pet. 4-5. Certain facts merit special attention, however, not because they are

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[2] Section 363(k) permits the denial of credit bidding "for cause," but the bankruptcy court found that cause was lacking, Pet. App. 43a-45a, and that finding was not appealed.

unique, but because they are typical of the cases in which this question arises.

1. As is true of more and more bankruptcies, the "reorganization" at issue here is in every meaningful sense an asset sale. *See* Baird & Rasmussen, *Chapter 11 at Twilight*, 56 Stan. L. Rev. 673, 675 (2003); Buccola & Keller, *Credit Bidding and the Design of Bankruptcy Auctions*, 18 Geo. Mason L. Rev. 99, 99 (2010) ("In high-stakes cases, bankruptcy judges now serve primarily as auctioneers."). As their names suggest, Petitioners are single-asset real-estate affiliates created to quarantine the financial risk associated with an individual development project. The project has gone "underwater"—meaning that its current value is below the outstanding balance on Petitioners' secured loans—and a stalking-horse bidder has offered to buy the project for only a fraction of the existing debt.[3] There is no other ongoing business to reorganize. Thus, the debtors' "plan" consists of nothing more than erasing the liens on their property by selling it to new owners. This is a valid, and indeed common, use of the bankruptcy process. *See In re Peachtree Lane Assocs., Ltd.*, 150 F.3d 788, 795 (7th Cir. 1998) ("'The typical chapter 11 case for a single asset real estate entity is about raising new capital, renegotiating loan terms, ... attempting to "cram down" a plan on the secured creditors, or selling the asset.'"). But in such cases, where a Chapter 11 plan amounts merely to selling secured assets and giving the lender the proceeds, the terms of the sale are crucial to protecting the secured lender's rights and ensuring a fair and orderly bankruptcy process.

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[3] The debtors owe "at least $120,000,000," Pet. App. 5a; the stalking-horse offer is $47,500,000, *id.* 6a.

2. As is also typical, the debtors in this case have not explained how denying secured lenders the right to credit bid will serve the central aim of the bankruptcy process: "maximizing the value of the bankruptcy estate." *Toibb* v. *Radloff*, 501 U.S. 157, 163 (1991). Indeed, there is no way in which constraining a secured lender's ability to bid, and thus limiting the number of potential bidders at an auction, can possibly maximize the value of the auctioned property. To the contrary, "credit bidding is an unalloyed good" for the bankruptcy estate, and "keeping a credit bidder from participating ... is an unsupportable strategy, at least for a debtor intent on maximizing its sale proceeds." Buccola & Keller, 119-120.

Debtors, however, are not always primarily concerned with maximizing the sale proceeds: A cheap sale to a stalking-horse bidder can benefit existing equity-holders while harming the estate. Here, for example, one of the debtors' principals has an equity stake in the stalking-horse bidder, and the stalking horse has agreed to preserve the existing management if its bid prevails. Denying credit bidding in this case—and, LSTA believes, in almost every case—thus presents a serious risk of favoritism to equity-holders or corporate managers, jeopardizing the paramount aim of estate maximization for the benefit of creditors.

REASONS FOR GRANTING THE WRIT

This case is an ideal candidate for certiorari. As Petitioners have demonstrated, there is a square split on this question among the Third, Fifth, and Seventh Circuits, each of which administers a substantial bankruptcy docket. The question presented is critically important to the administration of Chapter 11 bankruptcies and to secured lending in general, and the er-

roneous rule adopted by the Third and Fifth Circuits undermines Congress's careful scheme for the fair treatment of secured creditors. Finally, bankruptcy disputes' tendency to be mooted by the parties' common preference for expedition may well deprive this Court of future opportunities to resolve this division of authority—as occurred in *Philadelphia Newspapers* itself.

I. THE CIRCUITS ARE SPLIT

The circuit split on the credit-bidding question is plain and squarely presented. The plan language in this case is substantively identical to the language considered by the Third Circuit in *Philadelphia Newspapers*, and the Seventh Circuit reached the opposite conclusion because it "f[ou]nd the statutory analysis articulated by Judge Ambro in his *Philadelphia Newspapers* dissent to be compelling." Pet. App. 17a.

The split is also fully formed, with fully reasoned opinions on both sides. In addition to *Philadelphia Newspapers*, Petitioners' position derives support from the Fifth Circuit's decision in *In re Pacific Lumber Co.*, 584 F.3d 229 (5th Cir. 2009). That case concerned a judicial valuation and transfer rather than a public auction, but the Fifth Circuit nonetheless concluded that "a sale occurred," *id.* at 245, and held that this sale could be allowed notwithstanding that it "depriv[ed] [secured creditors] of the right to credit bid," *id.* at 247. The Fifth Circuit considered whether Section 1129(b)(2)(A)(ii) mandates that all "free and clear" sales under a plan provide for credit bidding, and held that it does not. *Id.* at 245-249. Meanwhile, the contrary interpretation has been fully explicated in the decision below and in Judge Ambro's detailed dissent. These are extensively reasoned opinions from judges with

substantial commercial law and bankruptcy experience. Additional percolation is unlikely to develop the arguments further in any meaningful way.

Moreover, the split will almost certainly persist unless this Court intervenes. The Third Circuit denied rehearing en banc in *Philadelphia Newspapers* despite another dissent from Judge Ambro and amicus support for rehearing. The erroneous rule is thus fully entrenched in the Third Circuit, where many business bankruptcies are filed and many more could be if debtors choose, given the number of businesses incorporated in Delaware. *See* 28 U.S.C. §1408 (providing venue for Chapter 11 cases in any jurisdiction in which the debtor, or any affiliate seeking bankruptcy protection, is incorporated). And the positions of the Fifth and Seventh Circuits are likewise clear and unlikely to alter. This is particularly true because the extended bankruptcy appeal process and the incentives for quick resolution of such cases make it unlikely that these courts will even encounter the opportunity to revise their positions.

In short, this is a circuit split that is ready for resolution, and there is little to gain in deferring the question for another day. There is, however, much to lose: Credit bidding is a cornerstone of the Bankruptcy Code's carefully designed structure for protecting secured creditors' rights, and the Third and Fifth Circuits' holdings seriously weaken that structure.

II. THE THIRD AND FIFTH CIRCUITS' ERRONEOUS INTERPRETATION UNDERMINES CORE BANKRUPTCY PURPOSES

The interpretation of Section 1129(b)(2)(A) adopted by the Third and Fifth Circuits is wrong, and it opens a dangerous loophole in the Bankruptcy Code's meticu-

lous design. Credit bidding is an essential protection for secured creditors at bankruptcy sales, and the prospect of its routine denial poses a substantial risk to lenders and lending markets. Moreover, the denial of credit bidding is not only contrary to the Bankruptcy Code's carefully crafted scheme, but also serves no economically sound, bankruptcy-related purpose. The rule permitting its denial is thus an invitation to serious mischief with no offsetting benefits for bankruptcy administration.

A. The Third And Fifth Circuits' Interpretation Has No Basis In The Text And Undermines The Protections For Secured Creditors

The Third Circuit concluded, and Petitioners maintain, that Section 1129(b)(2)(A) *unambiguously* permits asset sales without credit bidding because it uses the word "or" to separate its three subsections, one of which speaks broadly of any plan that provides the "indubitable equivalent" of a secured lender's claim. *See Philadelphia Newspapers*, 599 F.3d at 304-314. As explained below, this reading is seriously at odds with the Code's intricate scheme of protections for secured creditors. But even the text of Section 1129(b)(2)(A) examined in isolation cannot support the Third Circuit's conclusion.

Indeed, the Third and Fifth Circuits' reading signally fails to harmonize the statute's three subsections: If a debtor *may* conduct an asset sale without credit bidding under subsection (iii)'s catch-call provision, then subsection (ii)'s language mandating credit bidding in such sales serves no purpose. The "indubitable equivalent" exception of subsection (iii) thus swallows the specific rules set out in subsections (i) and (ii). It is far more plausible that subsection (ii), in specifically

dealing with sales under a plan and requiring credit bidding, was intended to control the terms of *all* such sales. That is consistent with the ordinary rule favoring specific provisions over general ones, *see D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U.S. 204, 208 (1932), and with the canon disfavoring statutory surplusage, *see Duncan* v. *Walker*, 533 U.S. 167, 174 (2001).

Indeed, this Court recently addressed a statutory provision with an almost identical structure and rejected the approach that the Third and Fifth Circuits employed in interpreting Section 1129(b)(2)(A). In *Bloate* v. *United States*, 130 S. Ct. 1345, 1355 (2010), this Court held that even where a list of options is conjoined by the word "or," the best reading is that "each of the ... sub[sections] ... govern[s], conclusively unless the sub[section] itself indicates otherwise ..., the category of proceedings it addresses." As in *Bloate*, the fact that there are other types of plans that may be confirmed over a secured creditor's objection "in no way undermines [the] conclusion that a [plan] that falls *within* the category ... addressed by sub[section (ii)]"—in this case, plans providing for free-and-clear sales of secured creditors' collateral—"is governed by the limits in that sub[section]." *Id.* at 1354.

The Third and Fifth Circuit's reading also conflicts with the overall structure of the Bankruptcy Code and undermines its carefully designed protections for secured creditors' property interests in their collateral. For over a century, courts have adhered to the principle that bankruptcy law does not permit an "involuntary reduction of the amount of a creditor's lien for any reason other than payment on the debt." *Dewsnup* v. *Timm*, 502 U.S. 410, 419 (1992). The general rule is that absent consent, full payment, or surrender of the

collateral, a secured creditor's lien must survive the bankruptcy. *Id.* at 417.

Several interlocking provisions of the Bankruptcy Code are relevant to this protective treatment for secured claims. First, Section 506(a) typically "bifurcates" an under-secured claim: If a lien is secured by property worth less than the amount owed, the creditor's claim is divided into a secured claim equal to the present value of the collateral and an unsecured claim for the balance. This ensures that a secured creditor keeps its right to priority treatment in the disposition of its collateral, but may also vote with the other unsecured creditors as to the disposition of the assets that might satisfy the balance of its claim.

But this provision makes judicial valuation of collateral risky for secured lenders in cases (like this one) where the estate has no other assets: The secured lender gets nothing on its deficiency claim, so if the court undervalues the collateral, the lender will end up recovering less than it should. For example, if a loan for $100 is secured by property that the court believes is worth $40 but the lender believes is worth $80, and unsecured creditors will recover nothing because the debtor has no other assets, Section 506(a) might force the secured lender to accept $40 in satisfaction of its claim when it would much prefer the collateral itself.

Accordingly, Section 1111(b)(2) of the Code provides the under-secured creditor with an alternative: It may elect to have its entire claim treated as secured and give up its unsecured claim for the deficiency. *See* 7 *Collier on Bankruptcy* ¶¶1111.03[2][a], 1111.03[3][c], 1111.03[5] (16th ed. 2011). The creditor thereby protects itself from being forced to accept less than it believes its collateral is worth. If the debtor wants to

keep the collateral (perhaps because the debtor believes it is worth more than the court valuation), the secured creditor can keep its whole lien.

These provisions interact with the cram-down provisions through Section 1129(b)(2)(A)(i), which applies whenever the debtor chooses to keep the collateral subject to the secured creditor keeping its lien. Subsection (i) entitles the lien-holder to deferred cash payments that both "total[] at least the allowed amount of [the lien-holder's] claim" and have "a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property." 11 U.S.C. §1129(b)(2)(A)(i)(II). In plainer terms, the deferred payments must eventually equal the total face value of the loan, and that extended stream of payments must have a present discounted value equal to the collateral's present value. In the hypothetical above where the court values collateral securing a $100 loan at $40, the creditor is entitled to cash payments equal to $100 over time that, discounted for the time value of money, are worth $40 today.

It might seem that the difference between keeping a lien together with a $100 stream of payments worth $40 today and actually receiving $40 today is trivial, but it is not. By keeping its lien, the secured creditor who believes its collateral is really worth $80 prevents the debtor from exiting bankruptcy and selling the property the next day for more than the $40 court valuation, keeping the upside for itself. Indeed, both the leading treatise and the legislative history make clear that one of the core reasons for allowing secured creditors to make the Section 1111(b) election is to prevent the debtor from attempting to cash out the creditor at the present value of the collateral when the creditor thinks the collateral is worth more. *See* 7 *Collier on Bank-*

ruptcy ¶1111.03[3][c] ("The election can be utilized to prevent an attempted cash out .... A secured creditor, by electing to be fully secured under section 1111(b)(2), can require payment of the full amount of the claim, regardless of the value of the collateral."); 124 Cong. Rec. 32,408 (1978) (Rep. Edwards) ("The advantage [of the election] is that ... if the value of the collateral increases after the case is closed, the deferred payments will be secured claims."). The context of cases like this one makes this protection especially important:

> Since the issue relates so often to single-asset real estate cases, it is useful to recall exactly what Congress enacted in that particular regard. Through sections 1111(b), 1124 and 1129(b)(2)(A), Congress specifically legislated to prevent ... the debtor [from] retain[ing] the property subject to the mortgage by paying an appraised value, over the objection of the secured creditor.

7 *Collier on Bankruptcy* ¶1129.03[4][c][ii][B].

Together, these provisions ensure that a secured creditor is not forced to accept anything other than its full lien if the debtor keeps the collateral—an involuntary "cash out" at a judicial estimate of present value is off limits. Indeed, if the secured creditor is not to keep the full value of its lien (or be paid in full), the only thing it can be forced to accept is the property itself.

This is where credit bidding comes in, and why it is so important. A secured creditor is not entitled to make the Section 1111(b) election if the collateral will be sold. *See* 11 U.S.C. §1111(b)(1)(A)(ii), (B)(ii). But this is because the "creditor has the opportunity to protect its position. *It may bid its debt at the sale of the collateral and recover the collateral.* This ability gives

it the benefit of its bargain[.]" 7 *Collier on Bankruptcy* ¶1111.03[3][b] (emphasis added); *see also* 124 Cong. Rec. 32,407 ("Sale of property ... is excluded from treatment under section 1111(b) because of the secured party's right to bid in the full amount of his allowed claim at *any* sale of collateral[.]" (emphasis added)). Thus, as the leading treatise recognizes, the right to credit bid is, in essence, the right to take title to the collateral unless someone else will pay more than the full value of the lien. *See* 7 *Collier on Bankruptcy* ¶1129.04[2][b][ii] ("[I]f the secured party thinks the collateral is worth more than the debtor is selling it for, it may effectively bid its debt and take title to the property.").

Together, these provisions of the Code ensure that a secured lender can always either keep its full lien or get all of its collateral. It need not accept what the debtor, or the court, or a stalking-horse bidder thinks the collateral is worth—it can bid what it thinks the collateral securing its loan is worth and thus obtain the collateral, or it can retain its lien.

When Congress referred to providing a secured creditor with the "indubitable equivalent" of its claim, it had these rights in mind. According to the Bankruptcy Code's sponsors, "[a]bandonment of the collateral to the creditor would clearly satisfy indubitable equivalence, as would a lien on similar collateral." 124 Cong. Rec. 32,407. In other words, the creditor can keep its lien (secured by collateral of equal value), or the creditor must get the property. And that is exactly what Judge Hand said when he coined the phrase "indubitable equivalent" in *In re Murel Holding Corp.*: "[A secured creditor] wishes to get *his money or at least the property*. We see no reason to suppose that the statute was intended to deprive him of *that* ...

unless by a substitute of the most indubitable equivalence." 75 F.2d 941, 942 (2d Cir. 1935) (emphasis added).

There is thus no merit to the Third Circuit's suggestion—echoed by Petitioners—that the proceeds of a no-credit-bidding sale might eventually provide the indubitable equivalent under subsection (iii), making it appropriate to defer the question of equivalence until after the sale. *See* Pet. 10 (citing *Philadelphia Newspapers*, 599 F.3d at 312-313). As the foregoing makes clear, there is only one (trivial) way that a sale without credit bidding can provide the indubitable equivalent of a secured lender's claim. The creditor begins with alternative rights either to have his whole claim treated as secured under Section 1111(b) or to bid his whole claim as credit at any sale of the collateral under Section 1129(b)(2)(A)(ii). The no-credit-bidding sale deprives the creditor of his right to elect secured treatment for his whole claim without providing the Code's offsetting guarantee of credit bidding at the asset sale. Thus, the only way for such a sale to provide the indubitable equivalent of the rights it has destroyed is if it generates cash sufficient to pay the secured creditor's *whole* initial claim. But that is a trivial case: If a creditor is to be paid in full, then Section 1129(b)(2)(A)'s protections need not apply at all.[4]

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[4] Indeed, the plan the Third and Fifth Circuits have sanctioned is the paradigmatic *violation* of the indubitable equivalence standard. The Code's sponsors and the leading treatise agree that "present cash payments less than the secured claim would not satisfy the standard because the creditor is deprived of an opportunity to gain from a future increase in value of the collateral." 124 Cong. Rec. 32,407; 7 *Collier on Bankruptcy* ¶1129.04[2][c].

Accordingly, a leading scholar has called it "mystifying" how a plan sale without credit bidding could provide the indubitable equivalent of the secured creditor's lien, "[g]iven that credit-bidding allows the secured creditor to gain control over the asset and any other plan necessarily gives it something less." Baird, *Car Trouble* 16 (unpublished manuscript), https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=ALEA2010&paper_id=9 (last visited Sept. 8, 2011). Exactly so. The Third and Fifth Circuits' position allows debtors to take one of the three ways that the Code protects the same property right, subtract a protection of "significant value," and call the result the "indubitable equivalent." That cannot be right as a matter of statutory interpretation, and it undermines the basic purposes of the Bankruptcy Code.

B. Denying Credit Bidding Serves No Valid Bankruptcy Purpose

If the Third and Fifth Circuits' interpretation is allowed to stand, secured creditors will be able to protect their claims only by organizing, preparing, and financing cash bids sufficient to ensure that their liens are not erased through cheap sales to stalking-horse bidders. This self-help remedy is inadequate protection, and it serves no economically sound, bankruptcy-related purpose to impose this burden on secured creditors.

In general, a creditor may not be ready or able to obtain the financing required to make a cash bid on its collateral at an expedited sale. It may also have to pay sizable fees to investment banks to facilitate such a payment. Moreover, in the common case in which the loan was made by a group of many lenders under a syndicated loan agreement, the difficulty of reaching agreement on cash bidding terms may make it effec-

tively impossible. In fact, some creditors—such as mutual funds or collateralized loan obligations—may not be permitted to cash bid at all.[5] Thus, many secured creditors will be completely unable to bid on their collateral or able to do so only at great expense. *See* Buccola & Keller, 123-124. A sale at which secured creditors cannot get their collateral, or can do so only by paying new costs, cannot provide the indubitable equivalent of a secured claim. Rather, that entitlement is protected only at a sale at which the secured creditor retains the "significant value" of the power to credit bid. 3 *Collier on Bankruptcy* ¶363.09.

In fact, a recent scholarly article demonstrates that credit bidding tends to provide substantial benefits for the bankruptcy estate with essentially no countervailing harms. *See* Buccola & Keller, 100, 117-124. It finds that "credit bidding is an unalloyed good" for the bankruptcy estate for three reasons. *Id.* at 120.

First, credit bidding increases the number of available bidders, and having more bidders tends to produce higher bids. Auction theory (and common sense) make clear that the winning bid is based only on what the highest and next-highest bidders are willing to pay. Thus, adding more bidders can increase the winning bid, but cannot decrease it. *See* Buccola & Keller, 119

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[5] Securitization of loans has become very common. In a typical scenario, sometimes called a "collateralized loan obligation" (CLO), an entity buys loans and issues securities representing claims of various priority on principal and interest payments under the loans. The CLO manager is bound by an indenture specifying the permissible treatment of any cash on hand. The indenture is unlikely to permit the purchase of property, making cash bidding exceedingly difficult, if not impossible, for a significant group of secured creditors.

("Excluding an interested buyer, ... where every bidder potentially represents the auction participant with the highest or second-highest reservation price, creates a risk the seller has no reason to take."). "It follows that keeping a credit bidder from participating ... is an unsupportable strategy ... for a debtor intent on maximizing its sale proceeds," *id.* at 119-120, especially at expedited sales where there is a real prospect that the stalking horse will be the only party prepared to come with cash in hand. An auction with N+1 bidders is always better than an auction with only N, but this is especially so where N is very small.

Second, the secured lender is not just any bidder: It has unique information and a unique interest in preventing inside dealing by existing management. At expedited sales, lack of information may discourage some parties from participating at all, and may cause others to discount their bids in light of the risk that they have misvalued the asset. The secured lender likely knows the value of the asset better than most, and so may bid more confidently at higher values. Excluding or discouraging its participation is thus particularly damaging. Buccola & Keller, 120.

Moreover, the secured lender has a unique incentive and ability to deter abusive bidding or management malfeasance. Bankruptcy proceedings present a straightforward principal-agent problem, where the incentives of the debtor (and its existing management) are unlikely to accord with those of the creditors whose interests it has a duty to protect. Present management may have an incentive to favor "white knight" bidders who will preserve the existing business (and management's own positions). *See Dynamics Corp. of Am.* v. *CTS Corp.*, 805 F.2d 705, 711 (7th Cir. 1986). The secured creditors directly bear the costs of lowball bids

on their collateral and so have an incentive to defeat them. "Credit bidding affords them a ready tool to effectively act on that incentive," and, conversely, excluding the secured lenders from bidding their credit "is the most effective means for management to steer the debtor's assets to a favored, low-value purchaser." Buccola & Keller, 120.

Finally, credit bidding minimizes transaction costs that reduce value for the estate. Readying and financing a cash bid is costly, and a cash bidder must deduct these costs from its asset valuation to determine what it can profitably bid. These fees are diverted from the estate and flow instead to outside attorneys and banks. Because credit bidding avoids these costs, it allows the secured lender to offer that much more for the asset. From the standpoint of estate maximization, forcing the secured lender to pay in cash is manifestly ill-conceived. *See* Buccola & Keller, 121.

In short, denying the right to credit bid discourages participation by a low-cost, high-information bidder with interests unquestionably aligned with the estate. It is hard to explain how—if at all—such a choice can serve the best interests of the creditors.[6]

In any event, in the rare case in which there might be a reason to deny credit bidding, the Bankruptcy Code already provides that the bankruptcy court may do so "for cause." 11 U.S.C. §363(k). The debtors made

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[6] The suggestion that credit is somehow worse for the estate than cash is wholly illogical; the payment of cash and the release of secured debt equally reduce the estate's liabilities. *See* Buccola & Keller, 122 ("Forbidding credit bidding on the ground that credit is not cash is tantamount to prohibiting cash bidders from bidding with two fifty-dollar bills in lieu of a single, hundred-dollar note.").

such a motion below, and it was denied. Thus, the question presented here is whether a plan may provide for the free-and-clear sale of collateral, without allowing the lien-holders to credit bid, in a case in which there is—by definition—no cause for this denial. The Code should not be read to support such strange and unfair outcomes.

Indeed, such a rule ultimately favors no one—not even borrowers. Judicial rules granting inefficient rights to debtors drive up interest rates, and allowing evasion of secured creditors' right to credit bid will almost certainly have that result. The logical reaction to the increased risk of undervaluation created by the present rule in the Third and Fifth Circuits is an increased cost of capital for borrowers at a time when U.S. credit markets are still recovering from a historic crisis of confidence. Their rule thus poses a needless impediment to lending, investment, and economic growth.

III. Opportunities To Resolve This Split Are Unlikely To Recur

Bankruptcy appeals are frequently cut short by the parties' common need for expedited resolution. That is particularly true of the kind of single-asset sales that typically present the credit-bidding question. This case thus affords a potentially rare opportunity to resolve this important issue.

Credit bidding matters to creditors when their loans are under-secured and the estate lacks the assets to satisfy the deficiency. But these are also the circumstances under which delay is most harmful. An underwater real-estate asset leaks value every day in multiple ways. *First*, it depreciates—meaning it will fetch less when sold. *Second*, it accumulates more bills—

under Section 506(c), the secured creditor can be surcharged for all the costs of maintaining the property, "including the payment of all ad valorem property taxes." *Third*, it creates a mounting opportunity cost—the interest owed each month will now never be paid, and the creditor would like to salvage its funds from the sinking project and get them back to work.

At the same time, bankruptcy appeals can be protracted, often interposing an extra level of review between the initial decision and the court of appeals. *See* 28 U.S.C. §158. This is particularly likely in circuits like the Third and Fifth where the rule is now settled and bankruptcy courts are unlikely to certify no-credit-bidding plans for direct review. Creditors harmed by the rule may therefore need to engage in extended litigation through several levels of review even to be in a position to petition for en banc rehearing or certiorari.

Under these circumstances, most creditors can be expected to acquiesce in the detrimental denial of credit bidding simply to avoid the long delay that the path to this Court entails. Indeed, it will be no surprise if future cases presenting this question go the way of *Philadelphia Newspapers*: resolved by the rational, business-driven decisions of secured lenders to obviate their disputes before they can reach this Court.

Nonetheless, it is clear that Chapter 11 plans like the one presented will become more prevalent in the wake of their authorization by the Third Circuit: Petitioners admits that it modeled its plan on that decision, and others can be expected to do the same. The Third and Fifth Circuits' interpretation was unheard of in 30 years of experience under the Bankruptcy Code. *See Philadelphia Newspapers*, 599 F.3d at 319 (Ambro, J., dissenting). But now that a plan stripping secured

lenders of the right to credit bid has been approved, such plans will undoubtedly become more and more common, given their obvious (if inappropriate) attractions for debtors' equity-holders and existing management. And the increasing number of single-asset real-estate "reorganizations" that are essentially asset sales makes such plans more attractive still. The potential ubiquity of no-credit-bidding proposals for bankruptcies of this type requires, now more than ever, that the rules of asset sales be fair, uniform, and consistent with the purposes of the Code.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JOINT APPENDIX

RECORD
AND
BRIEFS

No. 11-166

In the Supreme Court of the United States

RADLAX GATEWAY HOTEL, LLC
and RADLAX GATEWAY DECK, LLC,
Petitioners,

v.

AMALGAMATED BANK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT APPENDIX, Vol. 1 of 2

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UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

In re: RadLAX Gateway Hotel, LLC, et al.,
Debtors

Date Filed 08/17/2009
Case No. 09-30047
(Jointly Administered)

RELEVANT DOCKET ENTRIES

DATE	#	DOCKET TEXT
		* * *
06/04/2010	205	Chapter 11 Plan of Reorganization Unsecured Creditors to be paid Unknown percent. Filed by Brian A. Audette on behalf of RadLAX Gateway Deck, LLC, RadLAX Gateway Hotel, LLC
06/04/2010	206	Notice of Motion and Motion to Approve procedures for sale of assets, scheduling auction, approving assumption and assignment procedures, form of notice, related relief Filed by Brian A. Audette on behalf of RadLAX Gateway Deck, LLC, RadLAX Gateway Hotel, LLC.

DATE	#	DOCKET TEXT
		Hearing scheduled for 6/9/2010 at 11:00 AM at 219 South Dearborn, Courtroom 615, Chicago, Illinois 60604. (Attachments: 1 Exhibit A 2 Proposed Order)
		* * *
06/22/2010	223	Supplement Filed by Brian A. Audette on behalf of RadLAX Gateway Deck, LLC, RadLAX Gateway Hotel, LLC
		* * *
07/08/2010	232	Objection to (related document(s): 206 Motion to Approve) Filed by Lauren Newman on behalf of Bomel Construction Corporation, Inc.
07/08/2010	233	Objection to (related document(s): 206 Motion to Approve) Filed by Ryan T Schultz on behalf of LAX Enterprise, LP (Attachments: 1 Exhibit 1 2 Exhibit 2 3 Exhibit 3 4 Exhibit 4 5 Exhibit 5)
		* * *
07/08/2010	235	Objection to (related document(s): 206 Motion to Approve) Filed by Mary E Olson on behalf of Amalgamated Bank

DATE	#	DOCKET TEXT
07/08/2010	236	Brief Filed by Nathan F Coco on behalf of FDIC-R
		* * *
07/20/2010	246	Omnibus Reply to (related document(s): 232 Objection, 233 Objection, 235 Objection, 239 Objection) Filed by David M Neff on behalf of RadLAX Gateway Deck, LLC, RadLAX Gateway Hotel, LLC (Attachments: 1 Group Exhibit A)
		* * *
08/20/2010	283	Second Supplement Filed by Brian A. Audette on behalf of RadLAX Gateway Deck, LLC, RadLAX Gateway Hotel, LLC (RE: 206 Motion to Approve)
		* * *
08/20/2010	286	Joint Modified Chapter 11 Plan of Liquidation Unsecured Creditors to be paid Unknown percent. Filed by Brian A. Audette on behalf of RadLAX Gateway Deck, LLC, RadLAX Gateway Hotel, LLC

DATE	#	DOCKET TEXT
08/20/2010	287	Disclosure Statement Filed by Brian A. Audette on behalf of RadLAX Gateway Deck, LLC, RadLAX Gateway Hotel, LLC
		* * *
10/05/2010	336	*Order Denying for the Reasons* Stated on the Record Motion to Approve (Related Doc # 206). Signed on 10/5/2010
		* * *
10/14/2010	341	Notice of Appeal to Appeal Court. Filed by David M Neff on behalf of RadLAX Gateway Deck, LLC, RadLAX Gateway Hotel, LLC. Fee Amount $255 (RE: 336 Order on Motion to Approve). Appellant Designation due by 10/28/2010. Transmission of Record Due by 11/23/2010
		* * *
10/14/2010	343	Notice of Motion and Motion for Certification of Direct Appeal to Appeal Court Filed by David M Neff on behalf of RadLAX Gateway Deck, LLC, RadLAX Gateway Hotel, LLC. Hearing scheduled for 10/21/2010 at 10:30 AM at 219 South Dearborn, Courtroom 615, Chicago, Illinois 60604.

DATE	#	DOCKET TEXT
		(Attachments: 1 Exhibit A 2 Proposed Order)
		* * *
10/28/2010	358	Objection to (related document(s): 343 Motion for Certification of Direct Appeal) Filed by Mary E Olson on behalf of Amalgamated Bank
		* * *
11/20/2010	361	Reply to (related document(s): 343 Motion for Certification of Direct Appeal, 358 Objection) Filed by David M Neff on behalf of RadLAX Gateway Deck, LLC, RadLAX Gateway Hotel, LLC
11/04/2010	362	Order Granting Motion for Request for Certification of Direct Appeal to Appeal Court (Related Doc # 343). Signed on 11/4/2010
		* * *
12/02/2010	388	Order from Appeal Court Dated 11/30/2010 Re: Appeal on Appellate Case Number: 1003598 by Judge Easterbrook, Ripple, Tinder. The court authorizes the direct appeal from the bankruptcy court's October 5, 2010, orders denying debtor's bid procedure motions.

DATE	#	DOCKET TEXT
		The court consolidated appeal no. 10-3598 with appeal no. 10-3597 for briefing and disposition. Appellants shall submit one consolidated brief due on or before January 18, 2011. Appellants' consolidated reply brief, if any, is due on or before March 3, 2011. The clerk of this court shall close cases numbered 10-8044 and 10-8045 as unnecessary. (RE: 341 Notice of Appeal). Signed on 12/2/2010
		* * *
01/11/2011	402-1	Reply to (related document(s): 369 Motion for Relief Stay, 399 Response) Filed by Mary E Olson on behalf of Amalgamated Bank (Attachments: 1 Exhibit A 2 Exhibit B)
		* * *
02/08/2011	422	Transcript regarding Hearing Held 1/27/2011. Remote electronic access to the excerpt/transcript is restricted until 05/9/2011. The excerpt/transcript may be viewed at the Bankruptcy Court Clerk's Office. For

DATE	#	DOCKET TEXT
		additional information, contact the Court Reporter J Defini Telephone number 312-987-9722. (RE: related document(s) 395 Hearing Motion Continued). Notice of Intent to Request Redaction Deadline Due By 2/15/2011. Redaction Request Due By 03/1/2011. Redacted Transcript Submission Due By 03/11/2011. Transcript access will be restricted through 05/9/2011
		* * *
02/15/2011	428	Second Modified Chapter 11 Plan Unsecured Creditors to be paid Unknown percent. Filed by Brian A. Audette on behalf of RadLAX Gateway Deck, LLC, RadLAX Gateway Hotel, LLC
02/15/2011	429	Attachment(s) Hotel Asset Purchase and Sale Agreement Filed by Brian A. Audette on behalf of RadLAX Gateway Deck, LLC, RadLAX Gateway Hotel, LLC
		* * *

DATE	#	DOCKET TEXT
12/14/2011	519	Order Denying Motion for Relief from Stay (Related Doc # 484). Signed on 12/14/2011

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

IN RE RADLAX GATEWAY HOTEL, LLC, et al.,
Debtors-Appellants

RADLAX GATEWAY DECK, LLC
Debtor-Appellant

v.

AMALGAMATED BANK
Appellee

Date Filed 11/04/2010
Docket for Case No. 10-3598
(Consolidated with 10-3597)

RELEVANT DOCKET ENTRIES

DATE	#	DOCKET TEXT
		* * *
11/30/2010	10	ORDER re: 1. Certification for Direct Appeal to Court of Appeals for the Seventh Circuit in In re River Road Hotel Partners, LLC. 2. Certification for Direct Appeal to Court of Appeals for the

DATE	#	DOCKET TEXT
		Seventh Circuit in In re Radlax Gateway Hotel, LLC. The court authorizes the direct appeal from the bankruptcy court's October 5, 2010, orders denying debtors' bid procedure motions. The court consolidates Appeal No. 10-3598 with Appeal No. 10-3597 for purposes of briefing and disposition. Appellants' shall submit one consolidated opening brief due on or before 01/18/2011 for River Road Expansion Partners, LLC, River Road Hotel Partners, LLC, RadLAX Gateway Deck, LLC and RadLAX Gateway Hotel, LLC. Appellee's shall submit one responsive brief due on or before 02/17/2011 for Amalgamated Bank. Appellants' consolidated reply brief, if any, is due on or before 03/03/2011 for Appellant River Road Expansion Partners, LLC, Appellant River Road Hotel Partners, LLC, Appellant RadLAX Gateway Deck, LLC and Appellant RadLAX Gateway Hotel, LLC. The

DATE	#	DOCKET TEXT
		clerk of this court shall close cases numbered 10-8044 and 10-8045 as unnecessary
		* * *
01/18/2011	14	15 copies Appellant's brief filed by Appellants River Road Expansion Partners, LLC, River Road Hotel Partners, LLC and Appellee Amalgamated Bank in 10-3597, Appellants RadLAX Gateway Deck, LLC and RadLAX Gateway Hotel, LLC in 10-3598
		* * *
02/17/2011	17	15 copies Appellee's brief filed by Appellee Amalgamated Bank in 10-3597, 10-3598
02/17/2011	18	Motion filed by Appellee Amalgamated Bank in 10-3597, 10-3598 to supplement the record on appeal pursuant to Federal Rule of Appellate Procedure 27
		* * *

DATE	#	DOCKET TEXT
02/28/2011	26	15 copies Amicus brief filed by Amicus Curiae Loan Syndications and Trading Association in 10-3597 & 10-3598, per order * * *
03/03/2011	31	15 copies Appellant's reply brief filed by Appellants River Road Expansion Partners, LLC and River Road Hotel Partners, LLC in 10-3597, Appellants RadLAX Gateway Deck, LLC and RadLAX Gateway Hotel, LLC in 10-3598
03/03/2011	32	Motion filed by Debtor-Appellants River Road Expansion Partners, LLC and River Road Hotel Partners, LLC in 10-3597, Appellants RadLAX Gateway Deck, LLC and RadLAX Gateway Hotel, LLC in 10-3598 to supplement the record on appeal pursuant to rule 27 of the Federal Rules of Appellate Procedure * * *
04/07/2011	41	Case heard and taken under advisement by panel: Richard D. Cudahy, Circuit Judge;

DATE	#	DOCKET TEXT
		Daniel A. Manion, Circuit Judge and David F. Hamilton, Circuit Judge
		* * *
06/28/2011	43	Filed opinion of the court by Judge Cudahy. AFFIRMED. Richard D. Cudahy, Circuit Judge; Daniel A. Manion, Circuit Judge and David F. Hamilton, Circuit Judge
06/28/2011	44	ORDER: Final judgment filed per opinion. With costs: yes
07/20/2011	45	Mandate issued. Entire record returned consisting of 1 vol. of exhibits on a CD

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Case No. 09-30047
Chapter 11
(Jointly Administered)
Hon. Bruce W. Black

[Filed June 4, 2010]

In re:	)
	)
RADLAX GATEWAY HOTEL, LLC, et al.,	)
	)
Debtors.	)
	)

DEBTORS' JOINT CHAPTER 11 PLAN

RadLAX Gateway Hotel, LLC and RadLAX Gateway Deck, LLC hereby submit their Joint Chapter 11 Plan.

Dated: June 4, 2010

By: /s/ Brian A. Audette
PERKINS COIE LLP
David M. Neff (ARDC # 6190202)
Brian A. Audette (ARDC # 6277056)
Eric E. Walker (ARDC # 6290993)
131 S. Dearborn Street - Suite 1700
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Counsel to the Debtors

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INTRODUCTION

This joint chapter 11 plan (as amended or modified hereafter in accordance with its terms, the "Plan"), dated as of June 4, 2010, is proposed by RadLAX Gateway Hotel, LLC and RadLAX Gateway Deck, LLC (each a "Debtor" and collectively, the "Debtors"). Reference is made to the Disclosure Statement accompanying the Plan for a discussion of the Debtors' history, business, results of operations, historical financial information, properties, projections for future operations and risk factors, a summary and analysis of the Plan, and certain related matters. The Debtors are proponents of the Plan within the meaning of section 1129 of the Bankruptcy Code.

ALL CREDITORS OF THE DEBTORS ARE ENCOURAGED TO READ THE PLAN AND THE DISCLOSURE STATEMENT IN THEIR ENTIRETY BEFORE VOTING TO ACCEPT OR REJECT THE PLAN. SUBJECT TO CERTAIN RESTRICTIONS AND REQUIREMENTS SET FORTH IN SECTION 1127 OF THE BANKRUPTCY CODE, BANKRUPTCY RULE 3019 AND THE PLAN, THE DEBTORS RESERVE THE RIGHT TO ALTER, AMEND, MODIFY, REVOKE OR WITHDRAW THE PLAN PRIOR TO ITS SUBSTANTIAL CONSUMMATION.

Capitalized terms used herein shall have the meanings set forth in Article I hereof. The Debtors have obtained Bankruptcy Court authority to have the Chapter 11 Cases jointly administered for administrative and procedural purposes. In addition, the Plan is premised upon the substantive consolidation of the Debtors. Claims against, and Interests in, the Debtors (other than Administrative

Claims and Priority Tax Claims) are classified in Article II hereof and treated in Article III hereof.

ARTICLE I
DEFINITIONS, INTERPRETATION AND EXHIBITS

Section 1.01. Definitions. Unless the context requires otherwise, the following terms shall have the following meanings whether presented in the Plan or the Disclosure Statement with initial capital letters or otherwise. As used herein:

"Administrative Claim" means a Claim for: (a) any cost or expense of administration (including, without limitation, the fees and expenses of Professionals) of any of the Chapter 11 Cases asserted or arising under sections 503, 507(a)(1), 507(b) or 1114(e)(2) of the Bankruptcy Code including, but not limited to (i) any actual and necessary post Petition Date cost or expense of preserving the Debtors' respective Estates or operating the businesses of the Debtors, (ii) any post Petition Date cost, indebtedness or contractual obligation duly and validly incurred or assumed by the Debtors in the ordinary course of their business, (iii) compensation or reimbursement of expenses of Professionals to the extent Allowed by the Bankruptcy Court under sections 330(a) or 331 of the Bankruptcy Code, and (iv) all Allowed Claims that are entitled to be treated as Administrative Claims pursuant to a Final Order of the Bankruptcy Court under section 546 of the Bankruptcy Code; and (b) any fees or charges assessed against the Debtors' respective Estates under section 1930 of title 28 of the United States Code.

"Affiliate" shall have the meaning set forth in section 101(2) of the Bankruptcy Code.

"Allowed" means, with reference to any Claim, (a) any Claim against either of the Debtors that has been listed by the Debtors in their Schedules, as such Schedules may have been amended by the Debtors from time to time in accordance with Bankruptcy Rule 1009, as liquidated in amount and not disputed or contingent, and with respect to which no contrary proof of claim has been filed, (b) any Claim specifically allowed under the Plan, (c) any Claim the amount or existence of which has been determined or allowed by a Final Order, or (d) any Claim as to which a proof of claim has been timely filed before the Bar Date, provided that at the time of the Effective Date the Debtors have not identified such Claim as being objectionable in part or in whole and no objection to the allowance thereof has been filed by the Claims Objection Deadline; provided, however, that the term Allowed, with reference to any Claim, shall not include (x) any unliquidated claim or (y) interest or attorneys' fees on or related to any Claim that accrues from and after the Petition Date unless otherwise expressly provided for in the Plan; provided, further, that the term Allowed, with reference to any Senior Mechanic's Lien Claim shall mean any Mechanic's Lien Claim that is liquidated and determined to be senior to the Subordinate Mechanic's Lien Claims, the Prepetition Senior Secured Claim and any Miscellaneous Secured Claims by one or more Final Orders of any court of competent jurisdiction.

"Allowed Claim" means a Claim that is Allowed.

"Allowed Interest" means an Interest that is Allowed.

"Asset Management Fee" means one-half of one percent (0.5%) of Gross Operating Revenue for each Operating Year.

"Asset Purchase Agreement" means that certain Asset Purchase Agreement dated as of _____, 2010 by and among the Debtors, as sellers, and the Stalking Horse Bidder, as buyer, which provides for the sale of certain or substantially all of the Debtors' assets, or such other asset purchase agreement submitted at or prior to the Auction and subsequently determined by the Debtors pursuant to the Sale and Bid Procedures to be the highest or otherwise best offer for such assets.

"Auction" means the auction for the sale of the Debtors' assets to be held in accordance with the Sale and Bid Procedures.

"Avoidance Actions" means any and all Causes of Action which a trustee, debtor in possession, the Estates or other appropriate party in interest may assert under sections 502, 510, 541, 542, 543, 544, 545, 547, 548, 549, 550, 551, or 553 of the Bankruptcy Code (other than those which may be released or dismissed as part of and pursuant to the Plan) or under other similar or related state or federal statutes or common law, including fraudulent conveyance laws.

"Ballot" means the forms of ballots accompanying the Disclosure Statement upon which Holders of Impaired Claims and Interests entitled to vote on the Plan shall, among other things, indicate their

acceptance or rejection of the Plan in accordance with the instructions regarding voting.

"Bankruptcy Code" means the Bankruptcy Reform Act of 1978, as codified in title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.*, as in effect on the Petition Date, together with all amendments and modifications thereto that subsequently may be made applicable to the Chapter 11 Cases.

"Bankruptcy Court" means the United States Bankruptcy Court for the Northern District of Illinois or, if such court ceases to exercise jurisdiction over these proceedings, the court or adjunct thereof that exercises jurisdiction over the Chapter 11 Cases.

"Bankruptcy Rules" means: (a) the Federal Rules of Bankruptcy Procedure and the Official Bankruptcy Forms, as amended and promulgated under section 2075 of title 28 of the United States Code; (b) the Federal Rules of Civil Procedure, as amended and promulgated under section 2072 of title 28 of the United States Code; (c) any local rules applicable to the Bankruptcy Court; and (d) any standing orders governing practice and procedure issued by the Bankruptcy Court, each as in effect on the Petition Date, together with all amendments and modifications thereto that were subsequently made applicable to the Chapter 11 Cases or proceedings therein, as the case may be.

"Bar Date" means the applicable bar date by which a proof of Claim must be, or must have been, Filed, as established by an order of the Bankruptcy Court.

"Business Day" means any day which is not a Saturday, a Sunday, a "legal holiday" as defined in Bankruptcy Rule 9006(a), or a day on which banking institutions in the State of Illinois are authorized or obligated by law, executive order or governmental decree to be closed.

"Cash" means money, currency and coins, negotiable checks, balances in bank accounts and other lawful currency of the United States of America and its equivalents.

"Causes of Action" means any and all actions, claims, rights, defenses, third-party claims, damages, executions, demands, crossclaims, counterclaims, suits, choses in action, controversies, agreements, promises, rights to legal remedies, rights to equitable remedies, rights to payment and claims whatsoever, whether known, unknown, reduced to judgment, not reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured and whether asserted or assertable directly, indirectly or derivatively, at law, in equity or otherwise, accruing to the Debtors, including, but not limited to, the Avoidance Actions.

"Chapter 11 Cases" means the cases under chapter 11 of the Bankruptcy Code commenced by the Debtors in the Bankruptcy Court on the Petition Date.

"Claim" shall have the meaning set forth in section 101(5) of the Bankruptcy Code.

"Claims Objection Deadline" means the latest of: (a) 75 Days after the Effective Date; (b) 75 Days after

the date on which any Claim is Filed; or (c) such other date as may be fixed by the Bankruptcy Court, whether fixed before or after the date specified in clauses (a) and (b) above.

"Class" means each class, subclass or category of Claims or Interests as classified in Article II of the Plan.

"Confirmation" or "Confirmed" means the entry by the Bankruptcy Court of the Confirmation Order.

"Confirmation Date" means the date on which the Clerk of the Bankruptcy Court enters the Confirmation Order on the docket of the Bankruptcy Court with respect to the Chapter 11 Cases within the meaning of Bankruptcy Rules 5003 and 9021.

"Confirmation Hearing" means the hearing held before the Bankruptcy Court to consider Confirmation of the Plan pursuant to sections 1128 and 1129 of the Bankruptcy Code.

"Confirmation Order" means the order entered by the Bankruptcy Court confirming the Plan pursuant to section 1129 of the Bankruptcy Code.

"Creditor" means any Person that is the Holder of any Claim against any of the Debtors.

"Creditor Profit Sharing Income" means, with respect to each Operating Year, the amount of Gross Operating Profit for such Operating Year in excess of the sum of the following amounts attributable to such Operating Year: (a) the Management Fee; (b) the Asset Management Fee; (c) Purchaser Taxes; (d) Insurance

Costs; (e) the Reserve Fund Contribution for such Operating Year to the extent actually made; and (f) Purchaser's Return.

"Day(s)" means, unless expressly otherwise provided, calendar day(s).

"Debtors" shall have the meaning set forth in the Introduction.

"Deck" means that parcel of real estate adjacent to the Hotel upon which sits a partially constructed parking structure.

"Disallowed" means, with respect to any Claim or Interest or portion thereof, any Claim against or Interest in the Debtors which: (a) has been withdrawn, in whole or in part, by agreement of the Debtors or the Liquidation Trustee, as applicable, and the Holder thereof; (b) has been withdrawn, in whole or in part, by the Holder thereof; or (c) has been disallowed, in whole or part, by Final Order of the Bankruptcy Court or other court of competent jurisdiction. In each case a Disallowed Claim or a Disallowed Interest is disallowed only to the extent of disallowance or withdrawal.

"Disallowed Claim" means a Claim, or any portion thereof, that is Disallowed.

"Disallowed Interest" means an Interest, or any portion thereof, that is Disallowed.

"Disclosure Statement" means the Debtors' Disclosure Statement With Respect to the Joint Chapter 11 Plan, including all exhibits, appendices,

schedules and annexes, if any, attached thereto, as submitted by the Debtors, as the same may be altered, amended, supplemented or modified from time to time, and which was prepared and distributed in accordance with sections 1125 and 1126(b) of the Bankruptcy Code and Bankruptcy Rule 3018.

"Disputed" means any Claim or Interest that has been neither Allowed nor Disallowed.

"Disputed Claim" means a Claim, or any portion thereof, that is Disputed. For purposes of the Plan, a Claim that has been neither Allowed nor Disallowed shall be considered a Disputed Claim.

"Disputed Interest" means an Interest, or any portion thereof, that is Disputed. For purposes of the Plan, an Interest that has been neither Allowed nor Disallowed shall be considered a Disputed Interest.

"Effective Date" means the first Business Day following the date on which all conditions to consummation set forth in Article IX of the Plan have been satisfied or waived (if capable of being duly and expressly waived), provided that no stay of the Confirmation Order is then in effect.

"Effective Date Cash" means all of the Debtors' cash on hand as of the Effective Date, including, without limitation, the Cash in the Real Estate Tax Escrow Reserve.

"Entity" means any individual, corporation, limited or general partnership, joint venture, association, joint stock company, limited liability company, estate, trustee, United States Trustee, unincorporated

organization, government, governmental unit (as defined in the Bankruptcy Code), agency or political subdivision thereof.

"Estates" means the estates created in the Chapter 11 Cases pursuant to section 541 of the Bankruptcy Code upon commencement of the Chapter 11 Cases.

"Exculpated Persons" means: (a) directors, officers and employees of the Debtors, as of the Petition Date but prior to the Effective Date, and the Debtors' agents and professionals; (b) the Prepetition Senior Secured Lender (if Classes 3 and 6 vote to accept the Plan); (c) the Purchaser; (d) the Liquidation Trustee; and (e) to the extent such individuals are acting in such capacity, the respective current and former officers, directors, employees, agents, stockholders, managers, members, affiliates, partners, attorneys, advisors and professionals of the parties identified in subclauses (a) through (e).

"FBR" means FBR Capital Markets & Co., the Debtors' financial advisor and investment banker retained by the Debtors pursuant to a Bankruptcy Court order entered in the Chapter 11 Cases on September 21, 2009.

"File, Filed or Filing" means file, filed or filing with the Bankruptcy Court in the Chapter 11 Cases.

"Final Decree" means the final decree entered by the Bankruptcy Court after the Effective Date and pursuant to section 350(a) of the Bankruptcy Code and Bankruptcy Rule 3022.

"Final Order" means an order or judgment of the Bankruptcy Court, or other court of competent jurisdiction, as entered on the docket of such court, the operation or effect of which has not been stayed, reversed, vacated, modified or amended, and as to which order or judgment (or any revision, modification, or amendment thereof) of the time to appeal, petition for certiorari, or seek review or rehearing has expired and as to which no appeal, petition for certiorari, or petition for review or rehearing was filed or, if filed, remains pending; provided, however, that the possibility that a motion may be filed pursuant to Rules 9023 or 9024 of the Bankruptcy Rules or Rules 59 or 60(b) of the Federal Rules of Civil Procedure shall not mean that an order or judgment is not a Final Order.

"GAAP" means generally accepted accounting principles as defined by the Financial Accounting Standards Board.

"General Unsecured Claims" means all Claims that are not Administrative Claims, Priority Tax Claims, Professional Fee Claims, Miscellaneous Secured Claims, Miscellaneous Priority Claims, the Prepetition Senior Secured Claim, Insider Claims or the Los Angeles County Tax Collector Claim.

"Gross Operating Profit" means with respect to any period of time, the amount by which Gross Operating Revenue for such period exceeds Operating Expenses for such period.

"Gross Operating Revenue" means with respect to any period of time, all revenue and income of any kind derived directly or indirectly from operations at the

Hotel and properly attributable to the period under consideration (including rentals or other payments from licensees, lessees, or concessionaires of retail space in the Hotel, but not gross receipts of such licensees, lessees, or concessionaires), determined in accordance with GAAP and the Uniform System, except that the following shall not be included in determining Gross Operating Revenue:

(a) applicable excise, sales, occupancy and use taxes, or similar government taxes, duties, levies or charges collected directly from patrons or guests, or as a part of the sales price of any goods, services, or displays, including gross receipts, admission, cabaret, or similar or equivalent taxes;

(b) receipts from the financing, sale or other disposition of capital assets and other items not in the ordinary course of the Hotel's operations and income derived from securities and other property acquired and held for investment;

(c) receipts from awards or sales in connection with any governmental taking, from other transfers in lieu of and under the threat of any governmental taking, and other receipts in connection with any governmental taking, but only to the extent that such amounts are specifically identified as compensation for alterations or physical damage to the Hotel;

(d) proceeds of any insurance, including the proceeds of any business interruption insurance;

(e) rebates, discounts, or credits of a similar nature (not including charge or credit card discounts, which shall not constitute a deduction from revenues in determining Gross Operating Revenue, but shall constitute an Operating Expense).

(f) gratuities or service charges payable to Hotel personnel; and

(g) interest earned on funds or accounts.

"Holder" means an Entity holding a beneficial interest in a Claim or Interest and, when used in conjunction with a Class or type of Claim or Interest, means a holder of a beneficial interest in a Claim or Interest in such Class or of such type.

"Hotel" means the Radisson Hotel at Los Angeles International Airport, located at 6225 W. Century Blvd., Los Angeles, California.

"California Mechanic's Lien Law" means Division 3, Title 15, of the Civil Code of the State of California.

"Impaired" means, when used with reference to a Claim or Interest, a Claim or Interest that is impaired within the meaning of section 1124 of the Bankruptcy Code.

"Impaired Claim" means a Claim which is Impaired.

"Impaired Interest" means an Interest which is Impaired.

"Insider" shall have the meaning set forth in section 101(31) of the Bankruptcy Code.

"Insider Claims" means any Claim of an Insider against any of the Debtors, other than any Claim of an Insider that is a Claim for indemnification under the Debtors' organizational documents, employment agreements, internal policies or otherwise.

"Insurance Costs" means insurance premiums relating to liability and casualty coverage and business

interruption insurance policies maintained with respect to the Hotel.

"Interests" means any and all equity interests, ownership interests or shares in the Debtors issued by the Debtors prior to the Petition Date whether or not certificated, transferable, voting or denominated "stock" or a similar security, and any Claim or Cause of Action related to or arising from any of the foregoing.

"Liens" means, with respect to any asset or Property (or the rents, revenues, income, profits or proceeds therefrom), and in each case, whether the same is consensual or nonconsensual or arises by contract, operation of law, legal process or otherwise: (a) any and all mortgages, liens, pledges, attachments, charges, leases evidencing a capitalizable lease obligation, conditional sale or other title retention agreement, or other security interest or encumbrance or other legally cognizable security devices of any kind in respect of any asset or Property, or upon the rents, revenues, income, profits or proceeds therefrom; or (b) any arrangement, express or implied, under which any Property is transferred, sequestered or otherwise identified for the purpose of subjecting or making available the same for the payment of debt or performance of any other obligation in priority to the payment of general unsecured Creditors.

"Liquidating Trust" means the trust to be established in accordance with Section 7.03 of the Plan.

"Liquidating Trust Agreement" means the agreement to be executed between the Liquidation

Trustee and the Debtors establishing the Liquidating Trust, which will be filed with the Plan Supplement.

"Liquidating Trust Documents" means the Liquidating Trust Agreement and any ancillary documents relating thereto.

"Liquidation Trustee" means the trustee of the Liquidating Trust.

"Los Angeles County Tax Collector Claim" means the principal amount of the Secured Claim of the Los Angeles County Tax Collector for real estate taxes relating to the Real Property for any period prior to the Petition Date through and including the Effective Date, without interest, fees, or other applicable charges or costs.

"Management Fee" means three percent (3%) of Gross Operating Revenue for each Operating Year.
"Mechanic's Lien Claims" means all Secured Claims against the Real Estate for mechanic's Liens arising under or pursuant to the California Mechanic's Lien Law. For clarity, Mechanic's Lien Claims shall be classified as Class 5 Claims (General Unsecured Claims).

"Miscellaneous Priority Claims" means any Claim against the Debtors entitled to priority pursuant to section 507(a) of the Bankruptcy Code, other than a Priority Tax Claim or an Administrative Claim.

"Miscellaneous Secured Claims" means any Secured Claim other than the Secured Claims of the Prepetition Senior Secured Lender, the Mechanic's

Lien Claims and the Los Angeles County Tax Collector Claim.

"Net Trust Assets" means the assets of the Liquidating Trust, minus all Cash to be distributed to Holders of Allowed Claims under the Plan and all reasonable costs and expenses incurred by the Liquidating Trustee in carrying out his or her duties.

"Objection" means any objection, application, motion, complaint or any other legal proceeding seeking, in whole or in part, to disallow, determine, liquidate, classify, reclassify or establish the priority, expunge, subordinate or estimate any Claim (including the resolution of any request for payment of any Administrative Claim) or Interest other than a Claim or an Interest that is Allowed.

"Operating Expenses" means all those ordinary and necessary expenses incurred in the operation of the Hotel, including Hotel personnel costs, the cost of maintenance and utilities, administrative expenses, the costs of advertising, marketing and business promotion and any amounts payable to the Hotel manager as set forth in the hotel management contract, all as determined in accordance with GAAP and the Uniform System. Notwithstanding the foregoing description, the following shall not constitute Operating Expenses: (a) the Management Fee; (b) the Asset Management Fee; (c) Purchaser Taxes; (d) Insurance Costs; (e) Capital Expenditures; (f) rentals of real and personal property (except, with respect to personal property, rentals incurred directly in connection with revenue generating activities); (g) depreciation and amortization of capitalized assets; (h) costs and expenses of Owner or Owner's personnel,

including entertainment expenses, salaries, wages and employee benefits of Owner's employees, directors' fees and the expenses of directors or Owner's employees to attend board meetings; and (i) professional fees and costs, including the fees and disbursements of attorneys, accountants and appraisers, incurred directly or indirectly in connection with any category of expense that is not itself an Operating Expense.

"Operating Year" means each twelve-month period commencing on the Effective Date (or anniversary of the Effective Date, as the case may be) and ending on the day immediately preceding the anniversary of the Effective Date.

"Person" means and includes a natural person, individual, partnership, corporation (as defined in section 101(a) of the Bankruptcy Code), or organization including, without limitation, corporations, limited partnerships, limited liability companies, general partnerships, joint ventures, joint stock companies, trusts, land trusts, business trusts, unincorporated organizations or associations, or other organizations, irrespective of whether they are legal entities, governmental bodies (or any agency, instrumentality or political subdivision thereof), or any other form of legal entities; provided, however, "Person" does not include governmental units, except that a governmental unit that (a) acquires an asset from a Person (i) as a result of the operation of a loan guarantee agreement or (ii) as receiver or liquidating agent of a Person; (b) is a guarantor of a pension benefit payable by or on behalf of a Debtor or an Affiliate of a Debtor; or (c) is the legal or beneficial owner of an asset of (i) an employee pension benefit plan that is a governmental plan, as defined in section

414(d) of the Internal Revenue Code of 1986 or (ii) an eligible deferred compensation plan, as defined in section 457(b) of the Internal Revenue Code of 1986, shall be considered for purposes of section 1102 of the Bankruptcy Code to be a Person with respect to such asset or such benefit.

"Petition Date" means August 17, 2009, the date on which the Debtors Filed their respective petitions for relief commencing the Chapter 11 Cases.

"Plan" means this Joint Chapter 11 Plan dated as of June 4, 2010, including all exhibits, appendices, schedules and annexes, if any, attached hereto, as submitted by the Debtors, including the Plan Supplement, as such Plan may be altered, amended, supplemented or modified from time to time in accordance with the provisions of the Bankruptcy Code, the Bankruptcy Rules, the Confirmation Order and the terms and conditions of Section 12.04 of the Plan.

"Plan Supplement" means the supplement to this Plan to be Filed with the Bankruptcy Court on or before the date that is five (5) Days prior to the Confirmation Hearing.

"Prepetition Senior Deficiency Claim" means the Claim of the Prepetition Senior Secured Lender, excluding the Prepetition Senior Secured Claim.

"Prepetition Senior Secured Claim" means the Claim of the Prepetition Senior Secured Lender, but only to the extent that such Claim is a secured claim as determined by section 506(a)(1) of the Bankruptcy Code.

"Prepetition Senior Secured Lender" means Amalgamated Bank, as Trustee of the Longview Ultra Construction Loan Investment Fund, in its capacity as administrative agent for itself and San Diego National Bank.

"Priority Tax Claim" means any and all Claims accorded priority in payment pursuant to section 507(a)(8) of the Bankruptcy Code. For clarity, the Los Angeles County Tax Collector Claim is not a Priority Tax Claim.

"Pro Rata Share" means, with respect to any Claim, a proportionate share, so that the ratio of the consideration distributed on account of an Allowed Claim in a Class to the consideration distributed on account of all Allowed Claims in that Class is the same as the ratio such Claim bears to the total amount of all Allowed Claims in that Class (plus Disputed Claims in that Class until disallowed).

"Professional Fee Claim" means a claim for compensation and/or reimbursement of expenses pursuant to sections 327, 328, 330, 331, 503(b) or 506(c) of the Bankruptcy Code relating to services incurred on and after the Petition Date and prior to and including the Effective Date in connection with an application made to the Bankruptcy Court by Professionals in the Chapter 11 Cases; provided, however, that in the case of the Debtors' primary bankruptcy counsel, Perkins Coie LLP, Professional Fee Claim shall include certain fees and expenses incurred prior to the Petition Date.

"Professionals" means any professional employed in these Chapter 11 Cases pursuant to sections 327 or

1103 of the Bankruptcy Code or any Professional entitled to compensation pursuant to sections 327, 328, 330, 331, 503(b)(2) or (4), 506(c) or 1103 of the Bankruptcy Code.

"Property" means all assets or property of the Debtors' respective Estates of any nature whatsoever, real or personal, tangible or intangible, including contract rights, accounts and Causes of Action, previously or now owned by the Debtors, or acquired by the Debtors' respective Estates, as defined in section 541 of the Bankruptcy Code.

"Purchaser" means the purchaser under the Asset Purchase Agreement.

"Purchaser Taxes" means and all Purchaser's taxes, including ad valorem taxes on real property, personal property taxes and business and occupation taxes, relating to or assessed in connection with the ownership or operation of the Hotel, but not including income, franchise, or similar taxes imposed on Purchaser.

"Purchaser's Return" means a twelve percent (12%) return on any and all costs incurred by Purchaser in (a) acquiring the Property, (b) completion and opening of the parking structure, and (c) completion of any franchisor required property improvement plans, including, without limitation, construction costs, financing charges, design fees, architectural and engineering fees, legal fees, third-party consultant fees, costs of purchasing and installing furniture, fixtures and equipment and operating supplies and equipment, pre-opening expenses, costs of purchasing

inventories, working capital and carrying costs associated with items (a) through (c) herein.

"Real Estate Tax Escrow Reserve" means the Cash escrow reserve the Debtors established for the payment of the Los Angeles County Tax Collector Claim.

"Real Property" means, collectively, the Hotel and the Deck.

"Reinstated or Reinstatement" means: (a) leaving unaltered the legal, equitable, and contractual rights to which a Claim entitles the Holder of such Claim so as to leave such Claim Unimpaired in accordance with section 1124 of the Bankruptcy Code; or (b) notwithstanding any contractual provision or applicable law that entitles the Holder of such Claim to demand or receive accelerated payment of such Claim after the occurrence of a default (i) curing any such default that occurred before or after the Petition Date, other than a default of a kind specified in section 365(b)(2) of the Bankruptcy Code; (ii) reinstating the maturity of such Claim as such maturity existed before such default; (iii) compensating the Holder of such Claim for any damages incurred as a result of any reasonable reliance by such Holder on such contractual provision or such applicable law; and (iv) not otherwise altering the legal, equitable, or contractual rights to which such Claim entitled the Holder of such Claim; provided, however, that any contractual right that does not pertain to the payment when due of principal and interest on the obligation on which such Claim is based, including, but not limited to, financial covenant ratios, negative pledge covenants, covenants or restrictions on merger or consolidation, and

affirmative covenants regarding corporate existence or which prohibit certain transactions or actions contemplated by the Plan, or conditioning such transactions or action on certain factors, shall not be required to be reinstated in order to accomplish Reinstatement.

"Rejection Claims" means claims of any non-Debtor counterparty to any unexpired leased of nonresidential real property or any executory contract arising on account of the rejection of such lease or contract during the administration of these Chapter 11 Cases under section 365 of the Bankruptcy Code or pursuant to the Plan or the Asset Purchase Agreement.

"Releasees" means: (a) the directors, members, managers, officers and employees of the Debtors, in each case as of the Petition Date or that have become directors, members, managers, officers, or employees thereafter but prior to the Effective Date, and the Debtors' agents and professionals, (b) the Prepetition Senior Secured Lender (if Classes 3 and 6 vote to accept the Plan), (c) the Purchaser, (d) the Liquidation Trustee, and (e) to the extent such parties are deemed Releasees, the respective current and former officers, directors, employees, agents, stockholders, managers, members, affiliates, partners, advisors and professionals of the parties identified in subclauses (a) through (e); provided, however, that the foregoing released parties identified in subclauses (a) through (e) above shall be released only from liabilities arising out of actions taken in such capacity.

"Reserve Fund Contribution" means the contribution of five percent (5%) of Gross Operating

Revenue to a separate account established to provide funds for Routine Capital Expenditures.

"Routine Capital Expenditures" means any (a) alterations, improvements, replacements, renewals and additions to any furniture, fixtures or equipment used in the ordinary course of operating the Hotel, and (b) certain repairs and maintenance to the Hotel which are normally capitalized under GAAP (e.g., interior repainting, resurfacing interior walls, floors and ceilings, and resurfacing parking areas).

"Sale" means the sale of certain or substantially all of the Debtors' assets under or in connection with the Plan and the Asset Purchase Agreement.

"Sale and Bid Procedures" means the sale, bid and auction procedures set forth in the Sale and Bid Procedures Motion.

"Sale and Bid Procedures Motion" means a motion to be filed in the Bankruptcy Court seeking approval of, among other things, sale and auction procedures in connection with the Sale.

"Sale Documents" means the Asset Purchase Agreement, the Schedule of Assumed Contracts, and any schedules, exhibits or other documents attached thereto or contemplated thereby, in each case as amended from time to time in accordance with their terms. The Disclosure Statement will include a form of the Sale Documents of the Stalking Horse Bidder in substantially the form to be implemented on the Effective Date.

"Sale Proceeds" means $47,500,000 to be paid by the Purchaser to or for the benefit of the Debtors' estates pursuant to the Asset Purchase Agreement, plus any additional sums to be paid by the Purchaser pursuant to the Asset Purchase Agreement, by adjustment or otherwise, minus any sums to be credited to the Purchaser pursuant to the Asset Purchase Agreement, by adjustment or otherwise.

"Schedule of Assumed Contracts" means the schedule listing certain executory contracts and unexpired leases to be assumed by the Debtors and assigned to the Purchaser under or in connection with the Asset Purchase Agreement, which schedule shall be set forth in or as an attachment or exhibit to the Asset Purchase Agreement.

"Schedules" means the schedules of assets and liabilities and statements of financial affairs Filed by the Debtors in the Chapter 11 Cases, as required by section 521 of the Bankruptcy Code, as the same may have been or may be amended, modified or supplemented.

"Secured Claim" means any Claim arising before the Petition Date that is: (a) secured in whole or part, as of the Petition Date, by a Lien which is valid, perfected and enforceable under applicable law on Property in which the Debtors' respective Estates has an interest and is not subject to avoidance under the Bankruptcy Code or applicable non-bankruptcy law; or (b) subject to setoff under section 553 of the Bankruptcy Code, but, with respect to both case (a) and (b), only to the extent of the value of the assets or Property securing any such Claim or the amount subject to setoff, as the case may be.

"Securities Act" means the Securities Act of 1933, as amended.

"Stalking Horse Bidder" means LAX Century & Sepulveda Hotel, LLC, a Delaware limited liability company.

"Tax" means any tax, charge, fee, levy, impost or other assessment by any federal, state, local or foreign governmental authority, including, without limitation, income, excise, property, sales, transfer, employment, payroll, franchise, profits, license, use, ad valorem, estimated, severance, stamp, occupation and withholding tax, together with any interest, penalties, fines or additions attributable to, imposed on, or collected by any such federal, state, local or foreign governmental authority.

"Unclaimed Property" means any distribution of Cash or any other Property made to the Holder of an Allowed Claim pursuant to the Plan that is returned to the Debtors or the Liquidation Trustee as undeliverable and no appropriate forwarding address is received prior to the date on which the Final Decree is entered in the Chapter 11 Cases, in the case of a distribution made in the form of a check, is not negotiated and no request for reissuance is made as provided for in Section 5.06 of the Plan.

"Uniform System" means the latest edition of the Uniform System of Accounts for the Lodging Industry that is published by the Hotel Association of New York City, Inc. and approved by the American Hotel & Motel Association.

"Unimpaired" means any Claim that is not Impaired within the meaning of section 1124 of the Bankruptcy Code.

"United States Trustee" means the United States Trustee appointed under section 581(a)(3) of title 28 of the United States Code to serve in the Northern District of Illinois.

"U.S. Trustee's Fee Claims" means any fees assessed against the Debtors' Estates pursuant to section 1930(a)(6) of title 28 of the United States Code.

Section 1.02. Rules of Interpretation. All references to "the Plan" herein shall be construed, where applicable, to include references to this document and all its exhibits, appendices, schedules and annexes, if any (and any amendments thereto made in accordance with the Bankruptcy Code). Whenever from the context it appears appropriate, each term stated in either the singular or the plural shall include the singular and the plural, and pronouns stated in the masculine, feminine or neuter gender shall include the masculine, feminine and the neuter. The words "herein," "hereof," "hereto," "hereunder," and other words of similar import refer to the Plan as a whole and not to any particular paragraph, subparagraph, or clause contained in the Plan. The words "includes" and "including" are not limiting and mean that the things specifically identified are set forth for purposes of illustration, clarity or specificity and do not in any respect qualify, characterize or limit the generality of the class within which such things are included. The captions and headings in the Plan are for convenience of reference only and shall not limit or otherwise affect the

provisions hereof. Any term used in the Plan that is not defined in the Plan, either in Article I hereof or elsewhere, but that is used in the Bankruptcy Code or the Bankruptcy Rules shall have the meaning assigned to that term in (and shall be construed in accordance with the rules of construction under) the Bankruptcy Code or the Bankruptcy Rules (with the Bankruptcy Code controlling in the case of a conflict or ambiguity). Without limiting the preceding sentence, the rules of construction set forth in section 102 of the Bankruptcy Code shall apply to the Plan, unless superseded herein. In computing any period of time prescribed or allowed by the Plan, the provisions of Bankruptcy Rule 9006(a) and Section 13.18 hereof shall apply, but Bankruptcy Rule 9006(a) shall govern.

Section 1.03. Exhibits. Any Exhibits to the Plan, including the Plan Supplement, are incorporated into and are a part of the Plan as if set forth in full herein, regardless of when Filed.

ARTICLE II
CLASSIFICATION OF CLAIMS AND INTERESTS

Section 2.01. Generally. Pursuant to section 1122 of the Bankruptcy Code, set forth below is a designation of Classes of Claims and Interests. A Claim or an Interest is classified in a particular Class only to the extent that the Claim or Interest qualifies within the description of the Class and is classified in a different Class to the extent the Claim or Interest qualifies within the description of that different Class. A Claim or Interest is placed in a particular Class for the purpose of receiving distributions pursuant to the Plan only to the extent that such Claim or Interest is

an Allowed Claim or an Allowed Interest in that Class and such Claim or Interest has not been paid, released, settled or otherwise satisfied prior to the Effective Date.

Section 2.02. Unclassified Claims. In accordance with section 1123(a)(1) of the Bankruptcy Code, Administrative Claims and Priority Tax Claims are not classified and are excluded from the Classes designated in this Article II of the Plan. The treatment accorded Administrative Claims and Priority Tax Claims is set forth in Article III of the Plan.

Section 2.03. Unimpaired Classes. The Plan classifies the following Unimpaired Claims that are not entitled to vote on the Plan. Pursuant to section 1126(f) of the Bankruptcy Code, each Holder of a Claim in the following Classes is conclusively presumed to have accepted the Plan in respect of such Claims and is not entitled to vote to accept or reject the Plan:

Class 1 shall consist of all Miscellaneous Secured Claims.

Class 2 shall consist of all Miscellaneous Priority Claims.

Section 2.04. Impaired Classes Entitled to Vote. The Plan classifies the following Classes as the only Impaired Classes that may receive a distribution under the Plan and that are entitled to vote to accept or reject the Plan:

Class 3 shall consist of the Prepetition Senior Secured Claim.

Class 4 shall consist of the Los Angeles County Tax Collector Claim.

Class 5 shall consist of the General Unsecured Claims.

Class 6 shall consist of the Prepetition Senior Deficiency Claim.

Section 2.05. Impaired Classes Deemed to Reject. The Plan classifies the following Impaired Classes of Interests and Claims as Impaired Classes that are not entitled to vote to accept or reject the Plan. Pursuant to section 1126(g) of the Bankruptcy Code, each Holder of an Interest or Claim in these Classes is conclusively presumed to have rejected the Plan in respect of such Interests or Claims because the Plan does not entitle the Holders of such Interests and Claims to receive or retain any property under the Plan on account of such Interests or Claims. Accordingly, Holders of such Interests and Claims are not entitled to vote to accept or reject the Plan:

Class 7 shall consist of all Interests in the Debtors.

Class 8 shall consist of all Insider Claims.

ARTICLE III

PROVISIONS FOR TREATMENT OF CLASSES OF CLAIMS AND INTERESTS

Section 3.01. Satisfaction of Claims. The treatment of and consideration to be received by Holders of Allowed Claims pursuant to this Article III and the Plan shall be in full satisfaction, settlement, release, extinguishment and discharge of their respective Claims against the Debtors and the Debtors' respective Estates, except as otherwise provided in the Plan or the Confirmation Order.

Section 3.02. Unclassified Claims, Classified Unimpaired and Impaired Claims and Classified Interests. Administrative Claims and Priority Tax Claims are treated in accordance with section 1129(a)(9)(A) and section 1129(a)(9)(C) of the Bankruptcy Code, respectively. Such Claims are Unimpaired under the Plan and, in accordance with section 1123(a)(1) of the Bankruptcy Code, are not designated as Classes of Claims for purposes of this Plan and for purposes of sections 1123, 1124, 1126 and 1129 of the Bankruptcy Code. In addition, Class 1 Claims and Class 2 Claims are classified as Classes of Claims that are Unimpaired. In accordance with section 1126(f) of the Bankruptcy Code, the Holders of Claims in such Classes are conclusively presumed to have accepted the Plan and are not entitled to vote to accept or reject the Plan. Class 3 Claims, Class 4 Claims, Class 5 Claims and Class 6 Claims are Impaired and the Holders thereof are entitled to vote to accept or reject the Plan on account of such Allowed Claims. Class 7 Interests and Class 8 Claims are Impaired under the Plan and the Holders thereof will

neither receive nor retain any property on account of such Interests and Claims and, pursuant to section 1126(g) of the Bankruptcy Code, Holders of such Interests and Claims are conclusively presumed to have rejected the Plan and are not entitled to vote to accept or reject the Plan on account of such Interests and Claims.

Section 3.03. Administrative Claims. Administrative Claims are Unimpaired. Unless otherwise provided for herein, each Holder of an Allowed Administrative Claim shall receive in full satisfaction, settlement, release, extinguishment and discharge of such Claim: (a) the amount of such unpaid Allowed Claim in Cash from the Effective Date Cash (excluding the Cash in the Real Estate Tax Escrow Reserve), or in the case of any such unpaid Allowed Claim of FBR, from the Sale Proceeds, on or as soon as reasonably practicable after the later of (i) the Effective Date, (ii) the date on which such Administrative Claim becomes Allowed, or (iii) a date agreed to in writing by the Debtors or the Liquidation Trustee, as the case may be, and the Holder of such Administrative Claim; or (b) such other treatment on such other terms and conditions as may be agreed upon in writing by the Holder of such Claim and the Debtors or the Liquidation Trustee, as the case may be, or as the Bankruptcy Court may order.

Section 3.04. Priority Tax Claims. Priority Tax Claims are Unimpaired. Each Holder of an Allowed Priority Tax Claim shall receive in full satisfaction, settlement, release, extinguishment and discharge of such Priority Tax Claim: (a) the amount of such unpaid Allowed Priority Tax Claim in Cash from the Effective Date Cash (excluding the Cash in the Real

Estate Tax Escrow Reserve) on or as soon as reasonably practicable after the later of (i) the Effective Date, (ii) the date on which such Priority Tax Claim becomes Allowed or (iii) a date agreed to by the Debtors or the Liquidation Trustee, as the case may be, and the Holder of such Priority Tax Claim; or (b) such other treatment on such other terms and conditions as may be agreed upon in writing by the Holder of such Priority Tax Claim and the Debtors or the Liquidation Trustee, as the case may be, or as the Bankruptcy Court may order. Prior to the Effective Date, the Debtors shall have the right, in their sole discretion, to prepay at any time, in whole or in part, any Allowed Priority Tax Claim without premium or penalty of any sort or nature.

Section 3.05. Class 1: Miscellaneous Secured Claims. Class 1 Miscellaneous Secured Claims are Unimpaired. Each Holder of an Allowed Class 1 Miscellaneous Secured Claim shall receive, in the sole discretion of the Debtors or the Liquidation Trustee, as the case may be, in full satisfaction, settlement, release, extinguishment and discharge of such Claim: (a) Cash equal to the amount of such Allowed Miscellaneous Secured Claim from the Effective Date Cash (excluding the Cash in the Real Estate Tax Escrow Reserve) on or as soon as practicable after the later of (i) the Effective Date, (ii) the date that such Miscellaneous Secured Claim becomes Allowed, or (iii) a date agreed to by the Debtors or the Liquidation Trustee, as the case may be, and the Holder of such Class 1 Miscellaneous Secured Claim; (b) Reinstatement of such Allowed Miscellaneous Secured Claim; (c) the Property securing such Miscellaneous Secured Claim; or (d) such other treatment on such other terms and conditions as may

be agreed upon in writing by the Holder of such Claim and the Debtors or the Liquidation Trustee, as the case may be.

Section 3.06. Class 2: Miscellaneous Priority Claims. Class 2 Miscellaneous Priority Claims are Unimpaired. Each Holder of an Allowed Class 2 Miscellaneous Priority Claim shall receive in full satisfaction, settlement, release, extinguishment and discharge of such Claim: (a) the amount of such unpaid Allowed Miscellaneous Priority Claim in Cash from the Effective Date Cash (excluding the Cash in the Real Estate Tax Escrow Reserve) on or as soon as reasonably practicable after the later of (i) the Effective Date, (ii) the date on which such Class 2 Claim becomes Allowed, or (iii) a date agreed to by the Debtors or the Liquidation Trustee, as the case may be, and the Holder of such Class 2 Miscellaneous Priority Claim; or (b) such other treatment on such other terms and conditions as may be agreed upon in writing by the Holder of such Claim and the Debtors or the Liquidation Trustee, as the case may be.

Section 3.07. Class 3: Prepetition Senior Secured Claim. The Class 3 Prepetition Senior Secured Claim is Impaired. As soon as reasonably practicable after the later of (a) the Effective Date or (b) the date on which such Class 3 Claim becomes Allowed, the Holder of the Allowed Prepetition Senior Secured Claim shall receive, in full satisfaction, settlement, release, extinguishment and discharge of such Claim, (x) the Sale Proceeds in Cash after satisfaction in full of any Allowed Administrative Claim of FBR and (y) the balance of any Effective Date Cash (excluding Cash in the Real Estate Tax Escrow Reserve) after satisfaction in full of any Allowed Administrative Claims, any

Allowed Priority Tax Claims, any Allowed Class 1 Claims, any Allowed Class 2 Claims, any monetary cure amounts that are required to be paid to nondebtor parties to executory contracts and unexpired leases in connection with the assumption or assumption and assignment of such executory contracts and unexpired leases by the Debtors and, only to the extent that the Cash in the Real Estate Tax Escrow Reserve is insufficient, the Allowed Los Angeles County Tax Collector Claim.

Section 3.08. Class 4: Los Angeles County Tax Collector Claim. The Class 4 Los Angeles County Tax Collector Claim is Impaired. As soon as reasonably practicable after the later of (a) the Effective Date, (b) the date on which such Class 4 Claim becomes Allowed or (c) a date agreed to by the Debtors or the Liquidation Trustee, as the case may be, and the Holder of such Allowed Class 4 Claim, the Holder of the Allowed Los Angeles County Tax Collector Claim shall receive in full satisfaction, settlement, release, extinguishment and discharge of such Claim the amount of such unpaid Allowed Claim without interest in Cash from the Real Estate Tax Escrow Reserve (or Effective Date Cash in the event the funds in the Real Estate Tax Escrow Reserve are insufficient).

Section 3.09. Class 5: General Unsecured Claims. Class 5 General Unsecured Claims are Impaired. Each Holder of an Allowed Class 5 General Unsecured Claim shall receive, in full satisfaction, settlement, release, extinguishment and discharge of such Claim, Cash equal to its Pro Rata Share of: (a) fifteen percent (15%) of the Creditor Profit Sharing Income, if any, for each of the first three (3) Operating Years immediately following the Effective Date, with such Cash

distributions to the Holders of Allowed General Unsecured Claims occurring within ninety (90) Days following the expiration of the first (1st), second (2nd) and third (3rd) Operating Years, unless there is a dispute relating to the calculation of the amount of such Creditor Profit Sharing Income pursuant to Section 5.02 of the Plan, in which case the distribution(s) under this Section 3.09(a) shall be made within ninety (90) Days following (i) the final decision by the American Arbitration Association resolving a dispute under Section 5.02 of the Plan or (ii) the date of any written agreement between the Liquidation Trustee and the Purchaser resolving a dispute under Section 5.02 of the Plan; and (b) fifty percent (50%) of the Net Trust Assets, if any. Notwithstanding anything contained herein to the contrary, in no event shall the cumulative aggregate amount of Cash available to be distributed to Holders of Allowed General Unsecured Claims under Section 3.09(a) of the Plan be less than $150,000.

Section 3.10. Class 6: Prepetition Senior Deficiency Claim. The Class 6 Prepetition Senior Deficiency Claim is Impaired. The Holder of the Allowed Prepetition Senior Deficiency Claim shall receive, in full satisfaction, settlement, release, extinguishment and discharge of such Claim, Cash equal: (a) five percent (5%) of the Creditor Profit Sharing Income, if any, for each of the first three (3) Operating Years immediately following the Effective Date, with such Cash distributions to the Holder of the Allowed Prepetition Senior Deficiency Claim occurring within ninety (90) Days following the expiration of the first (1st), second (2nd) and third (3rd) Operating Years, unless there is a dispute relating to the calculation of the amount of such

Creditor Profit Sharing Income pursuant to Section 5.02 of the Plan, in which case the distribution(s) under this Section 3.10(a) shall be made within ninety (90) Days following (i) the final decision by the American Arbitration Association resolving a dispute under Section 5.02 of the Plan or (ii) the date of any written agreement between the Liquidation Trustee and the Purchaser resolving a dispute under Section 5.02 of the Plan; and (b) fifty percent (50%) of the Net Trust Assets, if any.

Section 3.11. Class 7: Interests. Class 7 Interests are Impaired. Holders of Class 7 Interests shall not receive or retain any property under the Plan on account of such Interests. On the Effective Date, all Interests shall be cancelled.

Section 3.12. Class 8: Insider Claims. Class 8 Insider Claims are Impaired. Holders of Class 8 Insider Claims shall not receive or retain any property under the Plan on account of such Insider Claims. On the Effective Date, all Insider Claims shall be extinguished.

ARTICLE IV
ACCEPTANCE OR REJECTION OF THE PLAN; CRAMDOWN

Section 4.01. Acceptance by Impaired Classes of Claims and Interests. Pursuant to section 1126(c) of the Bankruptcy Code, an Impaired Class of Claims shall have accepted the Plan if: (a) the Holders of at least two-thirds (2/3) in dollar amount of the Allowed Claims actually voting in such Class (other than Claims held by any Holder designated pursuant to section 1126(e) of the Bankruptcy Code) have timely

and properly voted to accept the Plan, and (b) more than one-half (1/2) in number of the Holders of such Allowed Claims actually voting in such Class (other than Claims held by any Holder designated pursuant to section 1126(e) of the Bankruptcy Code) have timely and properly voted to accept the Plan. No Class of Interests is entitled to vote on the Plan pursuant to section 1126 of the Bankruptcy Code.

Section 4.02. Voting Classes. Except as otherwise required by the Bankruptcy Code or the Bankruptcy Rules or as otherwise provided in this Section 4.02, the Holders of Claims in Classes 3, 4, 5 and 6 shall be entitled to vote to accept or reject the Plan in accordance with Section 4.01 of the Plan. Classes of Claims Unimpaired under the Plan (Miscellaneous Secured Claims (Class 1) and Miscellaneous Priority Claims (Class 2)) shall not be entitled to vote to accept or reject the Plan, and shall be conclusively presumed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code. The Class of Interests and Class of Claims that are Impaired under the Plan and whose Holders neither receive nor retain any property on account of such Claims and Interests under the Plan (Interests (Class 7) and Insider Claims (Class 8)) shall not be entitled to vote to accept or reject the Plan and shall be conclusively presumed to have rejected the Plan. Administrative Claims and Priority Tax Claims are Unimpaired and not classified under the Plan and hence are not entitled to vote to accept or reject the Plan pursuant to section 1126(g) of the Bankruptcy Code.

Section 4.03. Ballot Instructions. Each Holder of a Claim or Interest entitled to vote on the Plan will be asked to complete and return a Ballot to the Debtors

and the Debtors will compile the votes so received. Any questions as to the validity, form, and eligibility (including time of receipt) of Ballots will be resolved by the Bankruptcy Court upon application or at the Confirmation Hearing.

Section 4.04. Cramdown. If all applicable requirements for Confirmation of the Plan are met as set forth in section 1129(a)(1) through (13) of the Bankruptcy Code except subsection (8) thereof, the Debtors may request that the Bankruptcy Court confirm the Plan in accordance with section 1129(b) of the Bankruptcy Code, notwithstanding the requirements of section 1129(a)(8) thereof, on the bases that the Plan is fair and equitable, and does not discriminate unfairly with respect to each Class of Claims or Interests that is Impaired under, and has not accepted, the Plan.

ARTICLE V
PROVISIONS GOVERNING DISTRIBUTIONS UNDER THE PLAN

Section 5.01. Timing of Distributions. Except as specifically set forth in the Plan, distributions of Property will be made to Holders of Allowed Claims in accordance with Article III of the Plan. If a Claim is not an Allowed Claim as of the applicable distribution date, distributions will be made only if and when the Claim is Allowed, and then in accordance with Article III of the Plan and, with respect to the cure of defaults for assumed executory contracts and unexpired leases, Section 6.02 of the Plan, and in each case, subject to Article VIII of the Plan. Distributions to be made as of the Effective Date on account of Claims that are Allowed as of the Effective Date and are entitled to

receive distributions under the Plan shall be made on the Effective Date or as soon as reasonably practicable thereafter.

Section 5.02. Distributions to Holders of Allowed Claims. Except as otherwise provided herein, the Liquidation Trustee or the Debtors shall make all distributions required under the Plan in a manner consistent with the Plan. Distributions to Holders of Allowed Claims will be made in accordance with Article III of the Plan. On the Effective Date or as soon as is reasonably practicable thereafter, the Debtors shall deliver the Effective Date Cash and the Sale Proceeds to the Liquidation Trustee. Except in the event of a dispute as set forth below in this Section 5.02, within sixty (60) Days following the termination of the first (1st), second (2nd) and third (3rd) Operating Years following the Effective Date, the Purchaser shall deliver to the Liquidation Trustee twenty percent (20%) of the Creditor Profit Sharing Income, if any; provided, however, that if (a) there is no Creditor Profit Sharing Income for the first three (3) Operating Years following the Effective Date or (b) fifteen percent (15%) of the Creditor Profit Sharing Income for the first three (3) Operating Years following the Effective Date collectively totals less than $150,000, then the Purchaser shall deliver to the Liquidation Trustee Cash sufficient to ensure that the Purchaser's total distribution to the Liquidation Trustee pursuant to this Section 5.02 of the Plan totals no less than $150,000, which distribution, if any, shall occur within sixty (60) Days following the termination of the third (3rd) Operating Year following the Effective Date. If any dispute arises as to the calculation of the amount of the Creditor Profit Sharing Income to be delivered to the Liquidation

Trustee, the Liquidation Trustee and/or the Purchaser may submit such dispute to binding arbitration before the American Arbitration Association in Chicago, Illinois, in which case the Purchaser's delivery of the applicable Creditor Profit Sharing Income to the Liquidation Trustee pursuant to this Section 5.02 shall occur within sixty (60) Days following (x) the final decision by the American Arbitration Association resolving any such dispute or (y) the date of any written agreement between the Liquidation Trustee and the Purchaser resolving such dispute. If any dispute arises as to the identity of a Holder of an Allowed Claim who is to receive any distribution under the Plan, the Liquidation Trustee or the Debtors, as appropriate and in lieu of making such distribution to such Holder, may delay such distribution until the disposition thereof shall be determined by Final Order of the Bankruptcy Court or by written agreement among the interested parties to such dispute.

Section 5.03. Liquidating Trust. The Liquidating Trust shall be established to receive the Effective Date Cash, the Sale Proceeds, the applicable Creditor Profit Sharing Income, if any, and all other property of the Debtors not conveyed to the Purchaser in accordance with the Asset Purchase Agreement and to distribute such property and the proceeds of such property to Holders of Allowed Claims and Interests in accordance with the Plan. The Liquidating Trust shall qualify as a liquidating trust as described in Treasury Regulation section 301.7701-4(d) and shall be treated as a grantor trust for United States federal income tax purposes. The Debtors shall appoint the Liquidation Trustee, who shall have the authority to manage the day-to-day operations of the Liquidating Trust, including, without limitation, by disposing of the assets of the Liquidating

Trust, appearing as a party in interest, calculating distributions, paying taxes and such other matters as more particularly described in Section 7.04 of the Plan and the Liquidating Trust Agreement. Subject to the distributions required to be made under the Plan, expenses of the Liquidating Trust, including the expenses of the Liquidation Trustee and his representatives and professionals, will be satisfied from the assets of the Liquidating Trust and its proceeds, as set forth in the Liquidating Trust Agreement.

Section 5.04. Delivery of Distributions. Distributions to Holders of Allowed Claims shall be made by the Liquidation Trustee or the Debtors, as the case may be: (a) at the last known addresses of such Holders or (b) at the addresses set forth in any written notices of address changes delivered to the Debtors or the Liquidation Trustee, as appropriate. If any Holder's distribution is returned as undeliverable, no further distributions to such Holder shall be made unless and until the Liquidation Trustee or the Debtors, as the case may be, are notified of such Holder's then current address, at which time all missed distributions shall be made to such Holder without interest.

Section 5.05. Method of Cash Distributions. Any Cash payment to be made pursuant to the Plan may be made by Cash, draft, check, wire transfer, or as otherwise required or provided in any relevant agreement or applicable law at the option of the Liquidation Trustee or the Debtors, as the case may be.

Section 5.06. Failure to Negotiate Checks. Checks issued in respect of distributions under the Plan shall be null and void if not negotiated within sixty (60) Days after the date of issuance. Any amounts returned to the Liquidation Trustee in respect of such non-negotiated checks shall be held by the Liquidation Trustee. Requests for reissuance for any such check shall be made directly to the issuer of the check by the Holder of the Allowed Claim with respect to which such check originally was issued. All amounts represented by any voided check will be held until the earlier of: (a) one (1) month after date on which the check is voided, or (b) the date on which the Bankruptcy Court enters the Final Decree, and all requests for reissuance by the Holder of the Allowed Claim in respect of a voided check are required to be made prior to such date. Thereafter, all such amounts shall be deemed to be Unclaimed Property, in accordance with Section 5.07 of the Plan, and all Holders of Claims in respect of void checks shall be forever barred, estopped and enjoined from asserting a claim to such funds in any manner against the Debtors or their respective assets, the Liquidation Trustee or the Liquidating Trust.

Section 5.07. Unclaimed Distributions. All Property distributed on account of Claims must be claimed prior to the date on which the Bankruptcy Court enters the Final Decree, or, in the case of a distribution made in the form of a check, must be negotiated and a request for reissuance be made as provided for in Section 5.06 of the Plan. All Unclaimed Property will be retained by and will vest in the Liquidating Trust. All full or partial payments made by the Debtors and received by the Holder of a Claim prior to the Effective Date will be deemed to be

payments under the Plan for purposes of satisfying the obligations of the Debtors or the Liquidation Trustee pursuant to the Plan. Nothing contained in the Plan shall require the Debtors or the Liquidation Trustee to attempt to locate any Holder of an Allowed Claim other than by reviewing the records of the Debtors and any Claims filed in the Chapter 11 Cases. Pursuant to section 1143 of the Bankruptcy Code, all claims in respect of Unclaimed Property shall be deemed Disallowed and the Holder of any Claim Disallowed in accordance with this Section 5.07 will be forever barred, expunged, estopped and enjoined from asserting such Claim in any manner against the Debtors or their respective assets, the Liquidation Trustee or the Liquidating Trust.

Section 5.08. Limitation on Distribution Rights. If a claimant holds more than one Claim in any one Class, all Claims of the claimant in that Class will be aggregated into one Claim and one distribution will be made with respect to the aggregated Claim.

Section 5.09. Fractional Dollars. Notwithstanding any other provision of the Plan, Cash distributions of fractions of dollars will not be made; rather, whenever any payment of a fraction of a dollar would be called for, the actual payment made shall reflect a rounding of such fraction to the nearest whole dollar (up or down), with half dollars being rounded down. To the extent that Cash remains undistributed as a result of the rounding of such fraction to the nearest whole cent, such Cash shall be treated as Unclaimed Property pursuant to Section 5.07 of this Plan.

Section 5.10. Compliance With Tax Requirements. In connection with each distribution with respect to

which the filing of an information return (such as an Internal Revenue Service Form 1099 or 1042) or withholding is required, the Debtors or the Liquidation Trustee, as appropriate, shall file such information return with the Internal Revenue Service and provide any required statements in connection therewith to the recipients of such distribution or effect any such withholding and deposit all moneys so withheld as required by law. With respect to any Person from whom a tax identification number, certified tax identification number or other tax information required by law to avoid withholding has not been received by the Debtors or the Liquidation Trustee within thirty (30) Days from the date of such request, the Debtors or the Liquidation Trustee may, at their or its option, withhold the amount required and distribute the balance to such Person or decline to make such distribution until the information is received.

Section 5.11. De Minimis Distributions. No Cash payment of less than twenty-five ($25.00) dollars shall be made to any Holder of an Allowed Claim on account of such Allowed Claim.

ARTICLE VI
EXECUTORY CONTRACTS AND UNEXPIRED LEASES

Section 6.01. Treatment of Executory Contracts and Unexpired Leases. All executory contracts and unexpired leases of the Debtors shall be deemed rejected by the Debtors as of the Effective Date, except for any executory contract or unexpired lease that: (a) has previously been assumed, assumed and assigned, or rejected pursuant to an order of the Bankruptcy

Court on or prior to the Confirmation Date, (b) is the subject of a pending motion to assume, assume and assign, or reject as of the Confirmation Date, or (c) is listed on the Schedule of Assumed Contracts, provided, however, that the Debtors and the Purchaser shall have the right, at any time prior to the Confirmation Date, to amend the Schedule of Assumed Contracts in any manner set forth in the Asset Purchase Agreement, the Sale and Bid Procedures Motion, or by any other means approved by the Court, or to delete any executory contract or unexpired lease listed therein, thus providing for its rejection pursuant to this Section 6.01, or to add any executory contract or unexpired lease thereto, thus providing for its assumption and assignment pursuant to this Section 6.01 and the terms of the Asset Purchase Agreement. The assumption, assumption and assignment, and rejection of executory leases and unexpired contracts under this Plan shall be governed by the terms of the Asset Purchase Agreement, the Sale Documents, the Sale and Bid Procedures, and other orders of the Bankruptcy Court

Section 6.02. Cure of Defaults for Assumed Contracts and Leases. The cure of all defaults under executory contracts and unexpired leases to be assumed and assigned under the Asset Purchase Agreement, including the resolution of all objections to the adequacy of assurance of future performance under such contracts and leases and as to the adequacy of amounts proposed to cure defaults under such contracts and leases, shall be governed by the terms and conditions of the Sale and Bid Procedures, the Asset Purchase Agreement, the Sale Documents, any order approving the Asset Purchase Agreement or authorizing the Sale, and other orders of the Court.

All such cure amounts shall be satisfied by the Debtors from Effective Date Cash.

Section 6.03. Bar Date for Claims for Rejection Damages. Claims arising out of the rejection of any executory contract or unexpired lease pursuant to Article VI of the Plan must be filed with the Bankruptcy Court no later than the later of (a) twenty (20) Days after the Effective Date, or (b) thirty (30) Days after the entry of an order rejecting such executory contract or unexpired lease. Any Claim not filed within such time period shall be forever barred. The Debtors and the Liquidation Trustee shall have the right to object to any Claim arising out of the rejection of an executory contract or unexpired lease pursuant to the terms of Section 8.05 of this Plan.

Section 6.04. Treatment of Rejection Claims. The Bankruptcy Court shall determine any objections Filed in accordance with Section 8.05 hereof at a hearing to be held on a date to be determined by the Bankruptcy Court. Subject to any statutory limitation, including, but not limited to the limitations contained in sections 502(b)(6) and 502(b)(7) of the Bankruptcy Code, any Claims arising out of the rejection of executory contracts and unexpired leases shall, pursuant to section 502(g) of the Bankruptcy Code, be Impaired and treated as Class 5 Claims in accordance with Section 3.09 of the Plan.

ARTICLE VII
MEANS FOR IMPLEMENTATION OF THE PLAN

Section 7.01. The Sale. The Confirmation Order shall grant the relief requested in the Sale and Bid

Procedures Motion and authorize a sale of certain or substantially all of the Debtors' assets under sections 365, 1123(b)(4), 1129(b)(2)(A)(iii), 1145 and 1146(a) of the Bankruptcy Code under the terms and conditions of the Asset Purchase Agreement. Any Sale conducted via Auction shall be conducted in accordance with applicable orders of the Court, including, without limitation, interim or other orders approving the Sale and Bid Procedures Motion (prior to entry of the Confirmation Order). Upon Confirmation, the Debtors shall be authorized to take any and all actions necessary to consummate the Sale.

Section 7.02. Dissolution of the Debtors. The Confirmation Order shall authorize: (a) the dissolution of the Debtors, effective as of the Effective Date; and (b) the filing of certificates of dissolution (or the equivalent) with the Delaware Secretary of State. On the Effective Date, each of the manager and officers of the Debtors shall be deemed to have resigned from all of their respective positions with the Debtors.

Section 7.03. Liquidating Trust. The Liquidating Trust shall be established to receive on the Effective Date the Effective Date Cash, the Sale Proceeds and all other assets of the Debtors not transferred to the Purchaser pursuant to the Asset Purchase Agreement, all of which assets shall vest in the Liquidating Trust on the Effective Date free and clear of all Claims, encumbrances and interests in accordance with section 1141 of the Bankruptcy Code, but subject to the rights of Holders of Allowed Claims to obtain the distributions provided for in this Plan.

Section 7.04. Powers and Duties of the Liquidation Trustee. The Liquidation Trustee shall administer the Liquidating Trust and its assets in accordance with this Plan, the Liquidating Trust Agreement, and the other Liquidating Trust Documents and shall be responsible for, among other things, making distributions required under this Plan. From and after the Effective Date and continuing through the date of entry of a Final Decree, the Liquidation Trustee shall: (a) possess the rights of a party in interest pursuant to section 1109(b) of the Bankruptcy Code for all matters arising in, arising under, or related to the Chapter 11 Cases and, in connection therewith, shall (i) have the right to appear and be heard on matters brought before the Bankruptcy Court or other courts, (ii) be entitled to notice and opportunity for hearing on all such issues, (iii) participate in all matters brought before the Bankruptcy Court, and (iv) receive notice of all applications, motions, and other papers and pleadings filed in the Bankruptcy Court; (b) have the authority to act on behalf of the Debtors in all adversary proceedings and contested matters pending in the Bankruptcy Court and in all actions and proceedings pending elsewhere; and (c) have the authority to retain such personnel or professionals (including, without limitation, legal counsel, financial advisors or other agents that have provided professional services to the Debtors prior to the Effective Date) as it deems appropriate and compensate such personnel and professionals as it deems appropriate, all without prior notice to or approval of the Bankruptcy Court. Professionals and personnel retained or employed by the Liquidating Trust or the Liquidation Trustee need not be disinterested as that term is defined in the Bankruptcy Code.

Section 7.05. Obligations of the Purchaser. In accordance with the terms of the Plan the Purchaser shall, among other things, make one or more distributions to the Liquidation Trustee in accordance with Section 5.02 of the Plan.

Section 7.06. Application of Sale Proceeds. The Sale Proceeds shall be first distributed to satisfy any Allowed Administrative Claim of FBR in accordance with Section 3.03 of the Plan, then to the Holder of an Allowed Prepetition Senior Secured Claim in accordance with Section 3.07 of the Plan.

Section 7.07 Application of Cash in the Real Estate Tax Escrow Reserve. Cash in the Real Estate Tax Escrow Reserve shall be distributed to the Holder of the Allowed Los Angeles County Tax Collector Claim in accordance with Section 3.08 of the Plan.

Section 7.08 Application of Effective Date Cash. Effective Date Cash (excluding Cash in the Real Estate Tax Escrow Reserve) shall be first distributed to each Holder of Allowed Administrative Claims, Allowed Priority Tax Claims, Allowed Class 1 Claims, Allowed Class 2 Claims, nondebtor parties to executory contracts and unexpired leases to the extent monetary cure amounts are required to be paid to such parties in connection with the assumption or assumption and assignment of such executory contracts and unexpired leases by the Debtors and, only to the extent that the Cash in the Real Estate Tax Escrow Reserve is insufficient, to the Holder of the Allowed Los Angeles County Tax Collector Claim, in accordance with Sections 3.03, 3.04, 3.05, 3.06, 3.08 and 6.02 of the Plan. The balance of the Effective Date Cash shall be distributed to the Holder of the Allowed Prepetition

Senior Secured Claim in accordance with Section 3.07 of the Plan.

Section 7.09. Application of Creditor Profit Sharing Income. Creditor Profit Sharing Income, if any, shall be distributed to Holders of Allowed General Unsecured Claims and Allowed Prepetition Senior Deficiency Claims in accordance with Sections 3.09 and 3.10 of the Plan.

Section 7.10. Approval of Agreements. The solicitation of votes on the Plan shall be deemed a solicitation of the Holders of Claims for the approval of the Asset Purchase Agreement and the Sale in accordance with the Sale and Bid Procedures Motion. Entry of the Confirmation Order shall constitute approval of such agreements and transactions and the Confirmation Order shall so provide.

Section 7.11. Corporate Action. The entry of the Confirmation Order shall constitute authorization for the Debtors to take or to cause to be taken all limited liability company actions necessary or appropriate to consummate and implement the provisions of the Plan prior to, on and after the Effective Date, and all such actions taken or caused to be taken shall be deemed to have been authorized and approved by the Bankruptcy Court, including, without limitation, the execution and delivery of the Asset Purchase Agreement. Subject to the terms and conditions of the Asset Purchase Agreement, all such actions shall be deemed to have occurred and shall be in effect pursuant to applicable non-bankruptcy law and the Bankruptcy Code, without any requirement of further action by the stockholders or directors of the Debtors. On the Effective Date, the Debtors' appropriate officers,

managers, or other authorized Persons are authorized and directed to execute and deliver the agreements, documents and instruments contemplated by the Plan, the Plan Supplement and the Sale Documents in the name and on behalf of the Debtors.

Section 7.12. Revesting of Assets. Except as otherwise expressly provided in the Plan, pursuant to sections 1123(a)(5), 1123(b)(3) and 1141(b) of the Bankruptcy Code, all Property comprising the Estates of each Debtor not conveyed to the Purchaser under the Asset Purchase Agreement shall automatically vest in the Liquidating Trust, free and clear of all Claims, Liens, contractually-imposed restrictions, charges, encumbrances and Interests of Creditors and equity security holders on the Effective Date, with all such Claims, Liens, contractually-imposed restrictions, charges, encumbrances and Interests being extinguished except as otherwise provided in the Plan.

ARTICLE VIII
PRESERVATION OF CAUSES OF ACTION AND RIGHT TO DEFEND AND CONTEST

Section 8.01. Preservation of Rights. Except to the extent that any Claim is Allowed during the Chapter 11 Cases or expressly by this Plan, the Asset Purchase Agreement, or the Confirmation Order, nothing, including, but not limited to, the failure of the Debtors or the Liquidation Trustee to object to a Claim or Interest for any reason during the pendency of the Chapter 11 Cases shall affect, prejudice, diminish or impair the rights and legal and equitable defenses of the Debtors, the Liquidation Trustee or the Purchaser with respect to any Claim or Interest, including, but not limited to, all rights of the Debtors, Liquidation

Trustee or the Purchaser to contest or defend themselves against such Claims or Interests in any lawful manner or forum when and if such Claim or Interest is sought to be enforced by the Holder thereof.

Section 8.02. Rights of Action. Except as otherwise provided in the Plan, the Asset Purchase Agreement or the Confirmation Order, all Causes of Action, including Avoidance Actions, shall automatically be transferred to and become the property of the Liquidating Trust. Pursuant to section 1123(b)(3) of the Bankruptcy Code, the Liquidation Trustee (as a representative of the Debtors' Estates) will have the right to enforce and prosecute such Causes of Action against any Entity that arose before the Effective Date other than those expressly conveyed, released or compromised as part of or pursuant to the Plan or the Asset Purchase Agreement.

Section 8.03. Setoffs. Except to the extent that any Claim is Allowed, the Debtors, the Liquidation Trustee or the Purchaser, as applicable, may, but shall not be required to, set off against any Claims and the payments or distributions to be made pursuant to the Plan in respect of such Claims, any and all debts, liabilities, Causes of Action and claims of every type and nature whatsoever which the Estates, the Debtors or the Liquidation Trustee may have against such Creditors, but neither the failure to do so nor the allowance of any such Claims, whether pursuant to the Plan or otherwise, shall constitute a waiver or release by the Debtors, the Liquidation Trustee or the Purchaser of any such claims or Causes of Action the Debtors or the Liquidation Trustee may have against such Creditors, and all such claims and Causes of Action which are not expressly released, conveyed or

compromised pursuant to the Plan, the Asset Purchase Agreement or the Sale Order shall be conveyed to the Liquidating Trust.

Section 8.04. No Payment or Distribution Pending Allowance. All references to Claims and amounts of Claims refer to the amount of the Claim Allowed by agreement of the Debtors, the Liquidation Trustee or the Purchaser and the Holder of such Claim, by operation of law, by Final Order, or by this Plan. Notwithstanding any other provision in the Plan, no payment or distribution shall be made on account of or with respect to any Claim to the extent it is a Disputed Claim unless and until the Disputed Claim becomes an Allowed Claim.

Section 8.05. Resolution of Disputed Claims. Unless otherwise ordered by the Court after notice and a hearing, the Liquidation Trustee shall have the right, on and after the Effective Date, to File objections to Claims and shall serve a copy of each such objection upon the Holder of the Claim to which the objection is made as soon as practicable, but in no event later than the applicable Claims Objection Deadline. The foregoing deadlines may be extended by order of the Court. An objection to any Claim shall be deemed properly served on the Holder thereof if the Liquidation Trustee effects service in any of the following manners: (a) in accordance with Rule 4 of the Federal Rules of Civil Procedure, as modified and made applicable by Federal Rule of Bankruptcy Procedure 7004; (b) by first class mail, postage prepaid, on the signatory on the proof of claim or other representative identified in the proof of claim or any attachment thereto; or (c) by first class mail, postage

prepaid, on any counsel that has appeared on the Holder's behalf in the Chapter 11 Cases.

ARTICLE IX
CONDITIONS TO CONSUMMATION OF THE PLAN

Section 9.01. Confirmation Order. The Confirmation Order shall not be entered unless and until all conditions to entry of the Confirmation Order set forth in the Asset Purchase Agreement have been met.

Section 9.02. Conditions to Effective Date. The Plan shall not be consummated, and the Effective Date shall not occur, unless and until each of the following conditions have occurred or have been duly waived (if waivable) pursuant to Section 9.03 below:

a) the Bankruptcy Court shall have approved the information contained in the Disclosure Statement as adequate;

b) the Confirmation Order shall have been entered and become a Final Order and shall not be stayed by order of a court of competent jurisdiction;

c) all conditions precedent to the obligations of the Debtors and the Purchaser under the Asset Purchase Agreement have occurred;

d) the transactions contemplated in the Asset Purchase Agreement have been consummated;

e) the Bankruptcy Court shall have entered an order (contemplated to be part of the Confirmation Order), which shall have become a Final Order, authorizing and directing the Debtors to take all actions necessary or appropriate to enter into, implement, and consummate the documents created, amended, supplemented, modified or adopted in connection with the Plan;

f) all authorizations, consents and regulatory approvals required, if any, in connection with the Plan's effectiveness shall have been obtained;

g) the Debtors shall have appointed the Liquidation Trustee, the parties shall have executed the Liquidating Trust Agreement and the other Liquidating Trust Documents, and the Liquidation Trustee shall have received the Sale Proceeds and the Effective Date Cash;

h) no order of any court shall have been entered and shall remain in effect restraining the Debtors from consummating the Plan; and

i) each of the foregoing conditions shall have occurred (or been waived) on or before December 31, 2010.

Section 9.03. Waiver of Conditions to Consummation. The conditions to consummation in Section 9.02 (other than Sections 9.02(a), (b) and (d)) may be waived at any time by a writing signed by an authorized representative of the Debtors without

notice or order of the Bankruptcy Court or any further action other than proceeding to consummation of the Plan. Notwithstanding the foregoing, the conditions to consummation in Section 9.02 and the Asset Purchase Agreement may only be waived in accordance with the terms of the Asset Purchase Agreement.

Section 9.04. Effect of Failure or Absence of Waiver of Conditions Precedent to the Effective Date of the Plan. In the event that one or more of the conditions specified in Section 9.02 of the Plan have not occurred (or been waived), upon notification submitted by the Debtors to the Bankruptcy Court: (a) the Confirmation Order, automatically and without further order of the Bankruptcy Court, shall be, and shall be deemed, vacated, null and void, with no force or legal effect whatsoever; (b) no distributions under the Plan shall be made; (c) all Property of the Estates shall revest in the Debtors' Estates; (d) the Debtors and all Holders of Claims and Interests shall be restored to the status quo ante as of the day immediately preceding the Confirmation Date as though the Confirmation Date never occurred; (e) the Asset Purchase Agreement shall become null and void; and (f) the Debtors' obligations with respect to the Claims and Interests shall remain unchanged and nothing contained herein shall constitute or be deemed a waiver or release of any Claims or Interests by or against the Debtors or any other Person or Entity or to prejudice in any manner the rights of the Debtors or any Person or Entity in any further proceedings involving the Debtors.

ARTICLE X
EFFECTS OF CONFIRMATION

Section 10.01. Discharge. To the fullest extent permitted by applicable law (including, without limitation, section 105 of the Bankruptcy Code), and except as otherwise provided in the Plan or in the Confirmation Order, all consideration distributed under the Plan shall be in exchange for, and in complete satisfaction, settlement, discharge and release of, all Claims of any nature whatsoever against the Debtors or any of their assets or properties, regardless of whether any Property shall have been distributed or retained pursuant to the Plan on account of such Claims. Upon the Effective Date, and except as expressly contemplated in this Plan, the Debtors, and each of them, shall be deemed discharged and released under section 1141(d)(1)(A) of the Bankruptcy Code from any and all Claims, including, but not limited to, demands and liabilities that arose before the Effective Date, debts (as such term is defined in section 101(12) of the Bankruptcy Code), Liens, security interests, and encumbrances of and against all Property of the respective Estates or the Debtors that arose prior to the Effective Date, including without limitation, all debts of the kind specified in sections 502(g), 502(h) or 502(i) of the Bankruptcy Code, whether or not (a) such Claim has been Allowed pursuant to section 502 of the Bankruptcy Code, or (b) the Holder of such Claim has voted to accept the Plan. Further, as of the Effective Date, all entities, including, without limitation, all Holders of Claims or Interests, shall be barred and enjoined from asserting against the Debtors, the Liquidating Trust, the Liquidation Trustee, the Purchaser, their property or their successors or

assigns any other or further Claims, debts, rights, Causes of Action, liabilities or Interests relating to the Debtors based upon any act, omission, transaction or other activity of any nature that occurred prior to the Effective Date, except for those obligations expressly created by, or reserved in, this Plan. In accordance with the foregoing, except as provided in the Plan or the Confirmation Order, the Confirmation Order shall be a judicial determination of discharge of all such Claims and other debts and liabilities against the Debtors and termination of all Interests, pursuant to sections 524 and 1141 of the Bankruptcy Code, and such discharge and termination shall void any judgment obtained against the Debtors, the Liquidating Trust, the Liquidation Trustee or the Purchaser at any time, to the extent that such judgment relates to a discharged Claim or terminated Interest.

Section 10.02. Injunction.

(a) Discharged Claims and Terminated Interests. Except as otherwise expressly provided for in the Plan or the Confirmation Order and to the fullest extent authorized or provided by the Bankruptcy Code, including sections 524 and 1141 thereof, the entry of the Confirmation Order shall, provided that the Effective Date occurs, permanently enjoin all Persons that have held, currently hold or may hold a Claim or other debt or liability that is Impaired or discharged or an Interest or other right of an equity security holder that is Impaired or terminated pursuant to the terms of the Plan from taking any of the following actions against the Debtors, the Liquidating Trust, the Liquidation Trustee, the Purchaser, or the Property of any of the

foregoing on account of any such discharged Claims, debts or liabilities or such terminated Interests or rights: (a) commencing, conducting or continuing in any manner, directly or indirectly, any suit, action or other proceeding of any kind; (b) enforcing, levying, attaching, collecting or otherwise recovering in any manner or by any means, whether directly or indirectly, any judgment, award, decree or order; (c) creating, perfecting or enforcing in any manner, directly or indirectly, any Lien or encumbrance of any kind; (d) asserting any setoff, offset, right of subrogation or recoupment of any kind, directly or indirectly, against any debt, liability or obligation due to the Debtors; and (e) proceeding in any manner in any place whatsoever, including employing any process, that does not conform to or comply with or is inconsistent with the provisions of the Plan.

(b) Released Claims. As of the Effective Date, the Confirmation Order shall constitute an injunction permanently enjoining any Person that has held, currently holds or may hold a Claim, demand, debt, right, Cause of Action or liability that is released pursuant to Section 10.04 of the Plan from enforcing or attempting to enforce any such Claim, demand, debt, right, Cause of Action or liability against (i) the Debtors, (ii) the Liquidating Trust, (iii) any Releasee, or (iv) any Exculpated Person, or any of their respective Property, based on, arising from or relating to, in whole or in part, any act, omission, or other occurrence taking place on or prior to the Effective Date with respect to or in any way relating to the Chapter 11 Cases, all of which claims, demands, debts, rights, Causes of Action or liabilities shall be deemed released on and as of the Effective Date; provided, however, that with respect to the former directors,

officers and employees of the Debtors, this injunction shall apply only to the enforcement of Claims, demands, debts, rights, Causes of Action or liabilities with respect to which such former directors, officers and employees would be entitled to indemnification from the Debtors under contract or law; and, provided further, however, that this injunction shall not apply to (a) any claims Creditors may assert under the Plan to enforce their rights thereunder to the extent permitted by the Bankruptcy Code or (b) any claims Creditors or other third parties may have against each other, which claims are not related to the Debtors, it being understood, however, that any defenses, offsets or counterclaims of any kind or nature whatsoever which the Debtors may have or assert in respect of any of the claims of the type described in (a) or (b) of this Section 10.02(b) are fully preserved.

Section 10.03. Exculpation. None of the Debtors, the Liquidating Trustee, the Purchaser or any Exculpated Person shall have or incur any liability to any Person, including, without limitation, any Holder of a Claim or Interest or any other party in interest, or any of their respective agents, employees, representatives, financial advisors, attorneys or affiliates or any of their successors or assigns, for any act taken or omission made in connection with, relating to, or arising out of, the Chapter 11 Cases, Filing, negotiating, prosecuting, administering, formulating, implementing, confirming or consummating this Plan, or the Property to be distributed under this Plan, including all activities leading to the promulgation and confirmation of the Plan, the Disclosure Statement (including any information provided or statement made in the Disclosure Statement or omitted therefrom), or any

contract, instrument, release or other agreement or document created in connection with or related to the Plan or the administration of the Debtors or these Chapter 11 Cases, provided, however, that the foregoing exculpation shall not apply to any act that is determined by a Final Order to constitute gross negligence or willful misconduct.

Section 10.04. Releases.

(a) Releases by Debtors. Effective as of the Effective Date, and except as otherwise provided in the Plan or the Confirmation Order, for good and valuable consideration, the adequacy of which is hereby confirmed, the Debtors, in their individual capacities and as debtors in possession, will be deemed to have forever released, waived and discharged the Releasees from any and all claims, obligations, suits, judgments, damages, demands, debts, rights, Causes of Action and liabilities (other than the rights of the Debtors or the Liquidation Trustee to enforce the Plan and the contracts, instruments, releases, indentures and other agreements or documents delivered thereunder), whether for tort, contract, violations of federal or state securities laws, or otherwise, whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, then existing or thereafter arising, in law, equity or otherwise that are based in whole or part on any act, omission, transaction, event or other occurrence, including actions in connection with indebtedness for money borrowed by the Debtors, taking place on or prior to the Effective Date in any way relating to the Debtors, the Chapter 11 Cases, or the Plan; provided, however, that the releases provided

in this Section 10.04(a) shall not be applicable to any Holder of a Claim that timely votes to reject the Plan.

(b) Releases by Holders of Claims and Interests. Effective as of the Effective Date, and except as otherwise provided in the Plan or the Confirmation Order, to the fullest extent permitted under applicable law, in consideration for the obligations of the Persons set forth below under the Plan and, if applicable, the Cash, securities, contracts, releases and other agreements or documents to be delivered in connection with the Plan, each Holder of a Claim that votes in favor of the Plan, and any Affiliate of any such Holder (as well as any trustee or agent on behalf of each such Holder) shall be deemed to have forever waived, released and discharged (i) the Debtors, (ii) the Liquidation Trustee, (iii) the Liquidation Trust, and (iv) the Releasees from any and all claims, obligations, suits, judgments, damages, demands, debts, rights, Causes of Action and liabilities (other than the rights of the Debtors or Liquidation Trustee to enforce the Plan and the contracts, instruments, releases, indentures and other agreements or documents delivered thereunder), whether for tort, contract, violations of federal or state securities laws, or otherwise, whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, then existing or thereafter arising, in law, equity or otherwise that are based in whole or part on any act, omission, transaction, event or other occurrence, including actions in connection with indebtedness for money borrowed by the Debtors, taking place on or prior to the Effective Date in any way relating to the Debtors, the Chapter 11 Cases, or the Plan.

Section 10.05. Other Documents and Actions. The Debtors are authorized to execute such documents and take such other action as is necessary or appropriate to effectuate the transactions provided for or contemplated by or in the Plan.

Section 10.06. Term of Injunctions or Stays. Unless otherwise provided herein or in the Confirmation Order, all injunctions or stays provided for in the Chapter 11 Cases under sections 105(a) or 362 of the Bankruptcy Code, or otherwise, and in existence on the Confirmation Date, shall remain in full force and effect until the Effective Date.

Section 10.07 Preservation of Insurance. Except as necessary to be consistent with the Plan, the Plan and the discharge provided herein shall not diminish or impair (a) the enforceability of insurance policies that may cover Claims against the Debtors or any other Person or Entity or (b) the continuation of any workers' compensation programs in effect, including self-insurance programs.

Section 10.08. Subordination Rights. Any distributions under the Plan shall be received and retained free of and from any obligations to hold or transfer the same to any other Creditor, and shall not be subject to levy, garnishment, attachment or other legal process by any Holder by reason of claimed contractual subordination rights, which rights shall be waived and the Confirmation Order shall constitute an injunction enjoining any Person from enforcing or attempting to enforce any contractual, legal or equitable subordination rights to Property distributed under the Plan, in each case other than as provided in the Plan.

Section 10.09. No Successor Liability. Except as otherwise expressly provided in the Plan or the Asset Purchase Agreement, the Debtors, the Liquidation Trustee and the Purchaser do not, pursuant to the Plan or otherwise, assume, agree to perform, pay, or indemnify or otherwise have any responsibilities for any liabilities or obligations of the Debtors or any other party relating to or arising out of the operations of or assets of the Debtors, whether arising prior to, on, or after the Effective Date. The Liquidating Trust, the Liquidation Trustee and the Purchaser are not, and shall not be, successors to the Debtors by reason of any theory of law or equity, and none shall have any successor or transferee liability of any kind or character, except that the Liquidating Trustee and the Liquidation Trust shall assume the obligations specified in the Plan, the Liquidating Trust Agreement, the other Liquidating Trust Documents, and the Confirmation Order and the Purchaser shall assume the obligations specified in the Asset Purchase Agreement.

ARTICLE XI
RETENTION OF JURISDICTION

Section 11.01. Exclusive Jurisdiction of Bankruptcy Court. Notwithstanding the entry of the Confirmation Order and the occurrence of the Effective Date, the Bankruptcy Court shall retain after the Effective Date exclusive jurisdiction of all matters arising out of, arising in or related to the Chapter 11 Cases to the fullest extent permitted by applicable law, including, without limitation, jurisdiction to:

(a) classify or establish the priority or secured or unsecured status of any Claim (whether Filed before or

after the Effective Date and whether or not contingent, Disputed or unliquidated) or resolve any dispute as to the treatment of any Claim pursuant to the Plan;

(b) grant or deny any applications for allowance of compensation or reimbursement of expenses pursuant to sections 330, 331 or 503(b) of the Bankruptcy Code or otherwise provided for in the Plan, for periods ending on or before the Effective Date;

(c) determine and resolve any matters related to the assumption, assumption and assignment or rejection of any executory contract or unexpired lease to which any Debtor is a party or with respect to which any Debtor may be liable, and to hear, determine and, if necessary, liquidate any Claims arising therefrom;

(d) ensure that all payments due under the Plan and performance of the provisions of the Plan are accomplished as provided herein and resolve any issues relating to distributions to Holders of Allowed Claims pursuant to the provisions of the Plan;

(e) construe, take any action and issue such orders, prior to and following the Confirmation Date and consistent with section 1142 of the Bankruptcy Code, as may be necessary for the enforcement, implementation, execution and consummation of the Plan and all contracts, instruments, releases, indentures and other agreements or documents created in connection with the Plan, including, without limitation, the Disclosure Statement and the Confirmation Order, for the maintenance of the integrity of the Plan and protection of the Liquidation

Trustee in accordance with sections 524 and 1141 of the Bankruptcy Code following consummation;

(f) determine and resolve any cases, controversies, suits or disputes that may arise in connection with the consummation, interpretation, implementation or enforcement of the Plan (and all Exhibits to the Plan and the Plan Supplement) or the Confirmation Order, including any indemnification and injunction provisions set forth in and contemplated by the Plan or the Confirmation Order, or any Entity's rights arising under or obligations incurred in connection therewith;

(g) hear any application of the Debtors or the Liquidation Trustee to modify the Plan after the Effective Date pursuant to section 1127 of the Bankruptcy Code and Section 12.04 hereof or modify the Disclosure Statement, the Confirmation Order or any contract, instrument, release, indenture or other agreement or document created in connection with the Plan, the Disclosure Statement or the Confirmation Order, or remedy any defect or omission or reconcile any inconsistency in any Bankruptcy Court order, the Plan, the Disclosure Statement, the Confirmation Order or any contract, instrument, release, indenture or other agreement or document created in connection with the Plan, the Disclosure Statement or the Confirmation Order, in such manner as may be necessary or appropriate to consummate the Plan, to the extent authorized by the Bankruptcy Code and the Plan;

(h) issue injunctions, enter and implement other orders or take such other actions as may be necessary or appropriate to restrain interference by any Entity

with consummation, implementation or enforcement of the Plan or the Confirmation Order;

(i) enter and implement such orders as are necessary or appropriate if the Confirmation Order is for any reason modified, stayed, reversed, revoked or vacated;

(j) determine any other matters that may arise in connection with or relating to the Plan, the Disclosure Statement, the Confirmation Order, the Asset Purchase Agreement, or any contract, instrument, release, indenture or other agreement or document created in connection with the Plan, the Disclosure Statement, the Asset Purchase Agreement or the Confirmation Order, except as otherwise provided in the Plan;

(k) determine such other matters and for such other purposes as may be provided in the Confirmation Order;

(l) hear and determine any other matters related hereto and not inconsistent with chapter 11 of the Bankruptcy Code;

(m) hear and determine disputes arising in connection with the interpretation, implementation or enforcement of the Plan or the Asset Purchase Agreement;

(n) enter one or more Final Decrees closing each of the Chapter 11 Cases;

(o) determine and resolve any and all controversies relating to the rights and obligations of

the Liquidation Trustee in connection with the Chapter 11 Cases;

(p) allow, disallow, determine, liquidate or estimate any Claim, including the compromise, settlement and resolution of any request for payment of any Claim, the resolution of any Objections to the allowance of Claims and to hear and determine any other issue presented hereby or arising hereunder, including during the pendency of any appeal relating to any Objection to such Claim (to the extent permitted under applicable law);

(q) permit the Debtors (and the Liquidation Trustee or the Purchaser, to the extent provided for in the Plan, the Asset Purchase Agreement or the Liquidating Trust Agreement) to recover all assets of the Debtors and Property of their respective Estates, wherever located;

(r) hear and determine any motions or contested matters involving taxes, tax refunds, tax attributes and tax benefits and similar or related matters with respect to the Debtors or the Debtors' respective Estates arising prior to the Effective Date or relating to the period of administration of the Chapter 11 Cases, including, without limitation, matters concerning federal, state and local taxes in accordance with sections 346, 505 and 1146 of the Bankruptcy Code;

(s) hear and determine any motions, applications, adversary proceedings, contested matters and other litigated matters pending on, Filed or commenced after the Effective Date that may be commenced by the Liquidation Trustee thereafter,

including Avoidance Actions, proceedings with respect to the rights of the Liquidation Trustee to recover Property under sections 542, 543 or 553 of the Bankruptcy Code, or proceedings to otherwise collect or recover on account of any claim or Cause of Action that the Debtors may have had; and

(t) hear any other matter not inconsistent with the Bankruptcy Code.

Section 11.02. Failure of Bankruptcy Court to Exercise Jurisdiction. If the Bankruptcy Court abstains from exercising or declines to exercise jurisdiction over any matter arising under, arising in or related to the Debtors, including with respect to the matters set forth above in Section 11.01 hereof, this Article XI shall not prohibit or limit the exercise of jurisdiction by any other court having competent jurisdiction with respect to such subject matter.

ARTICLE XII
MISCELLANEOUS PROVISIONS

Section 12.01. Binding Effect of Plan. The provisions of the Plan shall be binding upon and inure to the benefit of the Debtors, the Estates, the Liquidation Trustee, the Liquidating Trust, the Purchaser, any Holder of any Claim or Interest treated herein or any Person named or referred to in the Plan, and each of their respective heirs, executors, administrators, representatives, predecessors, successors, assigns, agents, officers and directors, and, to the fullest extent permitted under the Bankruptcy Code and other applicable law, each other Person affected by the Plan.

Section 12.02. Withdrawal of the Plan. The Debtors reserve the right, at any time prior to Confirmation of the Plan, to withdraw the Plan. If the Plan is withdrawn, the Plan shall be null and void and have no force and effect. In such event, nothing contained herein shall be deemed to constitute a waiver or release of any claims by or against the Debtors or any other Person or to prejudice in any manner the rights of the Debtors or any Person in any further proceedings involving the Debtors.

Section 12.03. Final Order. Except as otherwise expressly provided in the Plan or the Asset Purchase Agreement, any requirement in the Plan for a Final Order may be waived by agreement of the Debtors and the Purchaser or, after the Effective Date, the Liquidation Trustee upon written notice to the Bankruptcy Court. No such waiver shall prejudice the right of any party in interest to seek a stay pending appeal of any order that is not a Final Order.

Section 12.04. Modification of the Plan. The Debtors may alter, amend or modify the Plan in accordance with section 1127 of the Bankruptcy Code or as otherwise permitted at any time prior to the Confirmation Date. After the Confirmation Date and prior to the substantial consummation of the Plan, and in accordance with the provisions of section 1127(b) of the Bankruptcy Code and the Bankruptcy Rules, the Debtors or the Liquidation Trustee may, so long as the treatment of Holders of Claims or Interests under the Plan is not adversely affected, institute proceedings in the Bankruptcy Court to remedy any defect or omission or to reconcile any inconsistencies in the Plan, the Disclosure Statement or the Confirmation Order and any other matters as may be necessary to

carry out the purposes and effects of the Plan; provided, however, prior notice of such proceedings shall be served in accordance with Bankruptcy Rules 2002 and 9014.

Section 12.05. Business Days. If any payment or act under the Plan is required to be made or performed on a date that is not a Business Day, then the making of such payment or the performance of such act may be completed on the next succeeding Business Day, but shall be deemed to have been completed as of the required date.

Section 12.06. Severability. Should the Bankruptcy Court determine, prior to the Confirmation Date, that any provision of the Plan is either illegal on its face or illegal as applied to any Claim or Interest, such provision shall be unenforceable as to all Holders of Claims or Interests or to the specific Holder of such Claim or Interest, as the case may be, as to which such provision is illegal. Unless otherwise determined by the Bankruptcy Court, such a determination of unenforceability shall in no way limit or affect the enforceability and operative effect of any other provision of the Plan. The Debtors reserve the right not to proceed with Confirmation or consummation of the Plan if any such ruling occurs.

Section 12.07. Governing Law. EXCEPT TO THE EXTENT THAT THE BANKRUPTCY CODE OR BANKRUPTCY RULES OR OTHER FEDERAL LAWS ARE APPLICABLE, AND SUBJECT TO THE PROVISIONS OF ANY CONTRACT, INSTRUMENT, RELEASE, INDENTURE OR OTHER AGREEMENT OR DOCUMENT ENTERED INTO IN CONNECTION

WITH THE PLAN, THE CONSTRUCTION, IMPLEMENTATION AND ENFORCEMENT OF THE PLAN AND ALL RIGHTS AND OBLIGATIONS ARISING UNDER THE PLAN SHALL BE GOVERNED BY, AND CONSTRUED AND ENFORCED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF ILLINOIS, WITHOUT GIVING EFFECT TO CONFLICTS-OF-LAW PRINCIPLES WHICH WOULD APPLY THE LAW OF A JURISDICTION OTHER THAN THE STATE OF ILLINOIS.

Section 12.08. Payment of Statutory Fees. All U.S. Trustee's Fee Claims, as determined, if necessary, by the Bankruptcy Court at the hearing pursuant to section 1128 of the Bankruptcy Code, shall be paid on or before the Effective Date by the Debtors.

Section 12.09. Post-Confirmation Operating Reports. The Liquidation Trustee shall file quarterly operating reports until such time as a Final Decree or other order is entered under section 350(a) of the Bankruptcy Code closing the Bankruptcy Cases.

Section 12.10. Notices. Any notice required or permitted to be provided under this Plan to the Debtors, or any request for information with respect to the Plan, shall be in writing and served by either (a) certified mail, return receipt requested, postage prepaid, (b) hand delivery or (c) reputable overnight delivery service, freight prepaid, to be addressed as follows:

RadLAX Gateway Hotel, LLC
c/o The Harp Group, Inc.
9501 Technology Boulevard, Ste. 401
Rosemont, Illinois 60018
Attn: Timothy Franzen
Email: tfranzen@theharpgroup.com

With a copy to:

Perkins Coie LLP
131 S. Dearborn St., Ste. 1700
Chicago, Illinois 60603
Attn.: David M. Neff
Email: dneff@perkinscoie.com

Section 12.11. Filing of Additional Documents. On or before substantial consummation of the Plan, the Debtors shall issue, execute, deliver, and File with the Bankruptcy Court or record any agreements and other documents, and take any action as may be necessary or appropriate to effectuate, consummate and further evidence the terms and conditions of the Plan.

Section 12.12. Section 1125 of the Bankruptcy Code.

(a) The Debtors have, and upon Confirmation of the Plan shall be deemed to have, solicited acceptances of the Plan in good faith and in compliance with the applicable provisions of the Bankruptcy Code and (b) the Debtors (and each of their respective Affiliates, officers, directors, employees, consultants, agents, advisors, members, attorneys, accountants, financial advisors, other representatives and Professionals) have participated in good faith and in compliance with the applicable provisions of the Bankruptcy Code in

any offer, issuance, sale, and purchase of any securities offered and sold under the Plan, and are not, and on account of any such offer, issuance, sale, solicitation, and/or purchase will not be, liable at any time for the violation of any applicable law, rule, or regulation governing the solicitation of acceptances or rejections of the Plan or any offer, issuance, sale, or purchase of any securities offered and sold under the Plan.

Section 12.13. Section 1146 Exemption. To the fullest extent permitted under section 1146(a) of the Bankruptcy Code, the issuance, transfer or exchange of any security under the Plan, if any, or the execution, delivery or recording of an instrument of transfer under the Plan, or the revesting, transfer or sale of any real or other Property of or to the Debtors or the Liquidating Trust, shall not be taxed under any state or local law imposing a stamp tax, transfer tax or similar tax or fee. Consistent with the foregoing, each recorder of deeds or similar official for any county, city or governmental unit in which any instrument hereunder is to be recorded shall, pursuant to the Confirmation Order, be ordered and directed to accept such instrument, without requiring the payment of any documentary stamp tax, deed stamps, stamp tax, transfer tax, mortgage recording tax, intangible tax or similar tax.

Section 12.14. Section 1145 Exemption. To the fullest extent permitted under section 1145 of the Bankruptcy Code, the issuance of any interests in the Liquidating Trust on or around the Effective Date shall be exempt from the registration requirements of Section 5 of the Securities Act and any and all federal, state and local laws requiring the registration or

licensing of an issuer, underwriter, broker or dealer in such securities.

Section 12.15. Time. Unless otherwise specified herein, in computing any period of time prescribed or allowed by the Plan, the day of the act or event from which the designated period begins to run shall not be included. The last day of the period so computed shall be included, unless it is not a Business Day, in which event the period runs until the end of next succeeding day that is a Business Day. Otherwise, the provisions of Bankruptcy Rule 9006 shall apply.

Section 12.16. No Attorneys' Fees. No attorneys' fees will be paid by the Debtors or the Liquidation Trustee with respect to any Claim or Interest except as expressly specified herein or by order of the Bankruptcy Court.

Section 12.17. No Injunctive Relief. No Claim or Interest shall under any circumstances be entitled to specific performance or other injunctive, equitable or other prospective relief.

Section 12.18. Continued Confidentiality Obligations. Pursuant to the terms thereof, any other Holder of a Claim or Interest, the Purchaser, and their respective predecessors, successors and assigns shall continue to be obligated and bound by the terms of any confidentiality agreement executed by them in connection with these Chapter 11 Cases or the Debtors, to the extent that such agreement, by its terms, may continue in effect after the Confirmation Date.

Section 12.19. No Admissions or Waivers. Notwithstanding anything herein to the contrary, nothing contained in the Plan shall be deemed an admission or waiver by the Debtors with respect to any matter set forth herein, including, without limitation, liability on any Claim or Interest or the propriety of any classification of any Claim or Interest.

Section 12.20. Entire Agreement. The Plan (and any Exhibits to the Plan and the Plan Supplement) sets forth the entire agreement and undertakings relating to the subject matter hereof and supersedes all prior discussions and documents. The Debtors shall not be bound by any terms, conditions, definitions, warranties, understandings, or representations with respect to the subject matter hereof, other than as expressly provided for herein or as may hereafter be agreed to by the parties in writing.

Section 12.21. Waiver. The Debtors reserve the right to waive any provision of this Plan to the extent such provision is for the sole benefit of the Debtors and/or their officers or directors.

Section 12.22. Bar Date for Professionals. Applications for compensation for services rendered and reimbursement of expenses incurred by Professionals from the Petition Date through the Effective Date shall be Filed no later than ninety (90) Days after the Effective Date or such later date as the Bankruptcy Court approves. Applications that are not timely Filed will not be considered by the Court. The Liquidation Trustee may pay any Professional fees and expenses incurred after the Effective Date without any application to the Bankruptcy Court.

CONFIRMATION REQUEST

The Debtors hereby request confirmation of the Plan pursuant to section 1129(a) or section 1129(b) of the Bankruptcy Code.

Dated: June 4, 2010

RADLAX GATEWAY HOTEL, LLC
RADLAX GATEWAY DECK, LLC

By:/s/_____
Timothy G. Franzen
Authorized Agent and Representative

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Case No. 09-30047
Chapter 11
(Jointly Administered)

Hon. Bruce W. Black

[Filed June 4, 2010]

NOTICE OF MOTION

PLEASE TAKE NOTICE that on **Wednesday, June 9, 2010 at 11:00 a.m.**, or as soon thereafter as counsel may be heard, we will appear before the Honorable Bruce W. Black, or any judge sitting in his stead, in Room 615 of the Everett McKinley Dirksen Building, 219 South Dearborn Street, Chicago, Illinois 60604, and present the *Debtors' Motion for an Order: (A) approving procedures for the sale of substantially all of the Debtors' assets; (B) scheduling an auction; (C) approving assumption and assignment procedures; (D) approving form of notice; and (E) granting related relief*, a copy of which is hereby served upon you.

Dated: June 4, 2010

RADLAX GATEWAY HOTEL, LLC and RADLAX GATEWAY DECK, LLC

By: /s/ Brian A. Audette
PERKINS COIE LLP
David M. Neff (ARDC # 6190202)
Brian A. Audette (ARDC # 6277056)
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Facsimile: (312) 324-9400

Attorneys for the Debtors

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Case No. 09-30047
Chapter 11
(Jointly Administered)

Hon. Bruce W. Black

[Filed June 4, 2010]

DEBTORS' MOTION FOR AN ORDER: (A) APPROVING PROCEDURES FOR THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS; (B) SCHEDULING AN AUCTION; (C) APPROVING ASSUMPTION AND ASSIGNMENT PROCEDURES; (D) APPROVING FORM OF NOTICE; AND (E) GRANTING RELATED RELIEF

RadLAX Gateway Hotel, LLC ("Gateway Hotel") and RadLAX Gateway Deck, LLC ("Gateway Deck" and together with Gateway Hotel, the "Debtors") hereby move, pursuant to sections 105(a), 1123 and 1129 of title 11 of the United States Code (11 U.S.C. §§ 101 *et seq.*, the "Bankruptcy Code") and Rules 2002, 6004, and 6006 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), for entry of orders: (A) approving procedures for the sale of substantially all of the Debtors' assets; (B) scheduling an auction; (C) approving assumption and assignment procedures; (D) approving form of notice; and (E) granting related relief (the "Motion"). In support of this Motion, the Debtors state as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

2. Venue in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory bases for the relief requested herein are sections 105, 1123 and 1129 of the Bankruptcy Code and Bankruptcy Rules 2002, 6004 and 6006.

BACKGROUND

A. Commencement Of The Chapter 11 Cases, The Debtors' Assets And Pre-Petition Financing

4. On August 17, 2009 (the "Petition Date"), the Debtors commenced their cases (the "Chapter 11 Cases") by the filing of voluntary petitions for relief under chapter 11 of the Bankruptcy Code. On August 20, 2009, the Court entered an order directing joint administration of the Debtors' cases under Case No. 09-30047.

5. Gateway Hotel owns the Radisson Hotel at Los Angeles International Airport (the "Hotel"), which is the closest hotel (within walking distance) to Los Angeles International Airport and has 580 guest rooms, including 180 business-class rooms and 20 suites. Gateway Deck owns a parcel of real estate adjacent to the Hotel (the "Parking Land" and together with the Hotel, the "Real Property") upon which it had

been constructing a parking structure prior to having its funding terminated by its lender before the Petition Date.

6. In November, 2007, the Debtors obtained a $142,000,000 construction loan (the "Loan") from Amalgamated Bank, as Trustee of the Longview Ultra Construction Loan Investment Fund ("Amalgamated"), in its capacity as administrative agent for itself and San Diego National Bank ("SDNB" and together with Amalgamated, the "Lender") to renovate the Hotel and build a new parking structure upon the Parking Land. As of the Petition Date, the Debtors owed the Lender in excess of $120,000,000 on account of the Loan.

7. At the time the Loan was originated, SDNB was owned by FBOP Corporation, an Oak Park, Illinois based bank holding company. In the third and fourth quarters of 2008, FBOP Corporation was forced to write off the entirety of its nearly $800 million worth of investments of preferred shares in government-sponsored entities Freddie Mac (Federal Home Loan Mortgage Corporation) and Fannie Mae (Federal National Mortgage Association), which FBOP Corporation had spread out amongst its subsidiary banks, including SDNB, after both of the mortgage companies were seized by the federal government on September 8, 2008. Those investment losses left SDNB critically undercapitalized, which ultimately lead to the seizure of SDNB by the Federal Deposit Insurance Corporation (the "FDIC") and its sale to U.S. Bank National Association ("U.S. Bank").

8. SDNB is the subject of a certain Purchase and Assumption Agreement among Federal Deposit Insurance Corporation, Receiver of San Diego National

Bank, San Diego, CA, U.S. Bank, and the FDIC, which includes a certain Commercial and Other Assets Shared Loss Agreement (together, the "SDNB Agreement"). Pursuant to the SDNB Agreement, (a) U.S. Bank purchased certain of SDNB's loans, including SDNB's interest in or portion of the Loan, and (b) the FDIC must reimburse U.S. Bank for certain losses sustained by U.S. Bank in connection with the Loan.

9. As contemplated by the Loan and prior to the Petition Date, Gateway Hotel renovated the Hotel over the course of the second half of 2008 and Gateway Deck commenced construction in August, 2008 to build a new eight-level parking structure on the Parking Land. At the time of the Loan origination in November of 2007, the parking structure was anticipated to consist of only seven levels. Soon thereafter Gateway Deck commenced working with the City of Los Angeles to obtain the necessary entitlements to increase the size of the parking structure to eight levels. At all times, Lender was aware of Gateway Deck's efforts to obtain the entitlements from the City of Los Angeles to increase the size of the parking structure and that, if successful, building a larger parking structure would result in an increase to its construction budget (as well as increase in the value of its collateral). Gateway Deck was successful in obtaining the approval of the City of Los Angeles to construct an eight level parking structure, rather than a seven level structure.

10. In August of 2008, Gateway Deck began demolishing the old parking structure and immediately upon completion of that demolition began construction of the new eight-level parking structure.

The Lender and its third party construction consultant were provided with the revised construction plans for the larger parking structure and the revised and increased budget for its construction prior to commencement of the demolition and the new construction. Thereafter, Gateway Deck made regular monthly draw requests to the Lender for funds under the Loan to pay for the construction of the parking structure, which draw requests were all reviewed, approved and funded by the Lender until soon after SDNB suffered its losses related to its preferred shares in Freddie Mac and Fannie Mae.

11. After March of 2009, the Lender abruptly and unjustifiably terminated all funding under the Loan notwithstanding the fact that (a) the Lender had approved additional funding to account for the construction of an additional level to the parking structure, (b) contractors and subcontractors were owed substantial sums of money on account of work performed at the Hotel and upon the Parking Land, (c) the Lender had previously reviewed, approved and funded numerous construction draw requests under the Loan, (d) the Lender had directly encouraged and convinced the major contractors to continue working on the Hotel renovations and the parking structure and that the Lender would continue funding under the Loan in response to those contractors concerns to Gateway Deck and the Lender about funding future draw requests after prior draw requests had been funded late, and (e) Gateway Deck had executed a contract to sell the parking structure upon its completion. As a direct result of the Lender's improper termination of funding under the Loan after it had promised to provide such funding, numerous parties filed mechanic's liens and commenced lawsuits against

the Debtors to enforce their rights under applicable California law, which claims total more than $15,000,000. Moreover, Gateway Deck has been unable to complete construction of its new parking structure, thereby (x) nullifying Gateway Deck's ability to complete and sell its parking structure to partially repay the Lender, (y) subjecting the Debtors to litigation with LAX Enterprise, LP ("Enterprise"), which claims millions of dollars in damages for the Debtors' alleged continued interference with Enterprise's purported easement for the use of parking spaces upon the Parking Land (the "Enterprise Litigation") and (z) impairing the Hotel's ability to adequately service group business bookings due to the resulting lack of on-site parking and eliminating the Hotel's ability to operate parking operations profitably due to the costs of obtaining off-site parking.

B. Marketing The Debtors' Business And Assets

12. The Debtors retained FBR Capital Markets & Co. ("FBR") as their financial advisors and investment bankers to assist the Debtors with formulating one or more chapter 11 plans. In or about November, 2009, FBR went to market in an effort to generate interest in and offers for additional equity and/or financing alternatives. Since that time, interested parties have conducted extensive due diligence and evaluated the Debtors, their businesses, their assets, and their liabilities. Specifically, FBR targeted more than 80 individuals and entities regarding the Debtors' business and assets (the "Targets"). The Targets consist of private equity, hedge funds, public asset managers, public and private hospitality companies, and opportunity funds, all of which have been verified as possessing available capital and the ability to close

one or more transactions without any financing contingencies. Of those Targets, 30 have executed confidentiality agreements (thereby granting them access to an on-line data room) and the Debtors' representatives and FBR have had dozens of telephone conferences and/or in person meetings with these Targets.

13. In connection with these efforts, the Debtors and FBR have procured LAX Century & Sepulveda Hotel, LLC (the "Stalking Horse") as the purchaser for substantially all of the Debtors' assets. The Stalking Horse's members are anticipated to be Och-Ziff Real Estate Acquisitions LP, or its designee ("OZRE"), which is expected to hold a ninety-five percent (95%) membership interest in the Stalking Horse, and The Harp Group, Inc., or its designee ("Harp"), along with Blue Vista Capital Partners, or its designee ("Blue Vista"), which are together expected to hold a five percent (5%) membership interest in the Stalking Horse. OZRE is unrelated to the Debtors. However, Harp's principal and sole shareholder, Peter G. Dumon, is one of the Debtors' principals and decision-makers and Blue Vista is also one of the Debtors' decision makers. Moreover, the Hotel's current management company, Portfolio LAX, LLC (a wholly owned subsidiary of Portfolio Hotels & Resorts, LLC), will continue to manage the Hotel if the Stalking Horse purchases it.

C. The Proposed Plan Sale Of Substantially All Of The Debtors' Assets

14. The Debtors have negotiated the primary economic terms of an Asset Purchase Agreement (the

"Stalking Horse Agreement")[1] with the Stalking Horse for the sale (the "Plan Sale") of substantially all of the Debtors' assets pursuant to the Debtors' Joint Chapter 11 Plan (the "Plan"),[2] which is being filed contemporaneously herewith. Under the Stalking Horse Agreement and Plan, as applicable, the Debtors' estates will be substantively consolidated and the Stalking Horse will pay to the Debtors' estates a cash purchase price of $47,500,000 (the "Purchase Price"), plus any additional sums to be paid by the Stalking Horse pursuant to the Stalking Horse Agreement, by adjustment or otherwise, minus any credits the Stalking Horse is entitled to under the Stalking Horse Agreement, by adjustment or otherwise (collectively, the "Sale Proceeds"). The Debtors further anticipate that they will have cash totaling approximately $1,480,000 on hand as of the effective date of the Plan that will have been escrowed by the Debtors for the payment of real estate taxes (the "Real Estate Tax Reserve"), plus an additional $2,300,000 of cash as of the effective date of the Plan, which amount is net of

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[1] The Debtors will supplement this Motion by filing a copy of the Stalking Horse Agreement as soon as practicable and before the Court enters an Order granting the Motion. Until the Stalking Horse Agreement has been executed by the Debtors and the Stalking Horse, the terms of the Stalking Horse Agreement identified herein are subject to further negotiation and modification. In the event of any conflict between the descriptions set forth herein and the terms and conditions of the Stalking Horse Agreement or the Plan, as the case may be, the terms and conditions of the Stalking Horse Agreement or the Plan, as applicable, shall prevail.

[2] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Plan.

all real estate taxes accrued up to that date to be paid from such cash (the "Cash on Hand").[3]

15. The Stalking Horse Agreement contains a due diligence period that will terminate 30 days following the entry of a final, non-appealable Court order granting this Motion and approving the Bid Procedures (as hereinafter defined). To the extent the Stalking Horse elects to terminate the Stalking Horse Agreement within the due diligence period provided therein, the Stalking Horse shall have no further rights or obligations under the Stalking Horse Agreement, the Plan, or otherwise. Moreover, pursuant to the Stalking Horse Agreement, the Debtors are required to: (a) obtain a final, non-appealable Court order approving this Motion and the Bid Procedures (defined below) on or before August 31, 2010; (b) obtain a final, non-appealable Court order approving a disclosure statement on or before October 11, 2010; (c) obtain a final, non-appealable Court order confirming the Plan on or before December 16, 2010; and (d) cause the effective date of the Plan to occur on or before December 31, 2010. Should the Debtors not meet any one or more of the foregoing deadlines, the Stalking Horse shall have the right to terminate the Stalking Horse Agreement without any liability.

16. As set forth in more detail in the Plan: (a) the Sale Proceeds will first be used to satisfy in full all costs of sale, including, without limitation, FBR's allowed administrative expense claim, with the balance of the Sale Proceeds distributed to the Lender

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[3] The Real Estate Tax Reserve and Cash on Hand estimates are based upon a presumed November 1, 2010 Plan effective date.

on account of its secured claim; (b) cash in the Real Estate Tax Reserve will be used to satisfy the Debtors' real estate taxes; and (c) Cash on Hand (excluding funds in the Real Estate Tax Reserve) will be used to pay in full all administrative expense claims (other than FBR's claim), any miscellaneous secured claims, any priority tax claims, any miscellaneous priority claims, any monetary cure costs required to be paid by the Debtors as a result of the assumption or assumption and assignment of any executory contracts or unexpired leases by the Debtors and real estate tax claims (only if the Real Estate Tax Reserve is insufficient), with the balance of such Cash on Hand (excluding funds in the Real Estate Tax Reserve) to be distributed to the Lender on account of its secured claim. The Stalking Horse Agreement and Plan further provide that the Stalking Horse will pay to the liquidating trust 20% of Creditor Profit Sharing Income (as defined in the Plan), if any, for the three Operating Years (as defined in the Plan) following the effective date of the Plan, of which 15% shall be distributed pro rata to the Debtors' general unsecured creditors and of which 5% shall be distributed to the Lender on account of its unsecured deficiency claim; provided, however that in no event shall the total amount of such funds to be made available by the Stalking Horse for distribution to the Debtors' general unsecured creditors only (and not on account of the Lender's unsecured deficiency claim) total less than $150,000 in the aggregate (all as set forth in more detail in the Plan).

17. FBR procured the Stalking Horse's offer for the purchase of substantially all of the Debtors' assets after more than five months of extensive marketing and solicitation. The Debtors have concluded, in their

business judgment, that the Stalking Horse Agreement represents the highest and best proposal received by the Debtors for their assets to date. The Debtors therefore believe that the value they will realize from the Stalking Horse Agreement constitutes fair market value for their assets and will support a confirmable Plan that will maximize value to their various creditor constituencies and bring a successful conclusion to these Chapter 11 Cases. Nevertheless, the Debtors' business and assets will be subject to a continued marketing effort and the Stalking Horse bid will be subject to higher or better offers. Accordingly, the Debtors are prepared to proceed with the sale of their business and assets under the terms of the Stalking Horse Agreement and the Plan, subject to higher and better bids in accordance with the procedures proposed in this Motion.

RELIEF REQUESTED

18. By this Motion, the Debtors request the entry of an order (the "Bid Procedures Order") substantially in the form attached hereto as Exhibit A: (A) approving Bid Procedures (as defined below) for the Plan Sale; (B) scheduling an auction (the "Auction"); (C) approving assumption and assignment procedures (the "Assumption and Assignment Procedures"); (D) approving the form of notice; and (E) granting related relief.

The Plan Sale to the qualified bidders with the highest or otherwise best bids at the Auction (a "Successful Bidder") will maximize the value of the Debtors' estates for the benefit of all of the Debtors' stakeholders, will fund and implement the Plan under section 1129 of the Bankruptcy Code, and, accordingly,

is in the best interests of the Debtors, their creditors, and their estates. Therefore, the Court should grant the relief requested herein.

THE PROPOSED BID AND ASSUMPTION AND ASSIGNMENT PROCEDURES

A. The Proposed Bid Procedures

20. The following proposed procedures (the "Bid Procedures"), which are also attached as Addendum 1 to the proposed Bid Procedures Order,[4] describe the general process the Debtors anticipate employing to govern the Plan Sale of substantially all of their assets, as such assets are more particularly described and identified in the Stalking Horse Agreement (collectively, the "Assets").

a. **The Assets.** The Debtors are offering the Assets for sale pursuant to the Plan, which includes the Real Property. The Assets will be sold as a single lot or two separate lots, which separate lots shall consist of the Hotel and the Parking Land. The Debtors shall retain all rights and title to their assets that are not subject to any bid(s) accepted by the Debtors and approved by the Bankruptcy Court at the Confirmation Hearing (defined below).

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[4] To the extent the description of the Bid Procedures set forth herein differs from those set forth in Addendum 1 to the Bid Procedures Order, the terms of Addendum 1 to the Bid Procedures Order shall control.

b. **The Bidding Process.** The Debtors shall in their sole discretion, but after consultation with their advisors and the Lender: (i) determine whether any person is a Potential Bidder (hereinafter defined); (ii) coordinate the efforts of Potential Bidders in conducting their respective due diligence investigations regarding the Debtors' business and assets; (iii) receive offers from Qualified Bidders (hereinafter defined); and (iv) negotiate any offer made to purchase the Assets (collectively, the "Bidding Process"). Neither the Debtors nor their representatives shall be obligated to furnish any information of any kind whatsoever relating to the Assets to any person who is not a Potential Bidder.

c. **Participation Requirements.** Unless otherwise ordered by the Bankruptcy Court, for cause shown, or as otherwise determined by the Debtors in their sole discretion, but after consultation with the Lender, in order to participate in the Bidding Process each person (a "Qualified Bidder") must submit a bid that adheres to the following requirements (a "Qualified Bid"):

    i. All bids must be submitted to Kevin Phillips and Jim O'Brien of FBR Capital Markets & Co., 237 Park Avenue, 19th Floor, New York, New York 10017, with copies to David M. Neff, Perkins Coie LLP, 131 S. Dearborn St., Ste. 1700, Chicago, Illinois 60603, not later than 5:00

p.m. (prevailing Chicago Time) on or before _____, 2010 (the "Bid Deadline"). The Debtors shall immediately distribute by facsimile transmission or electronic mail a copy of each bid received to counsel for the Lender.

ii. All bids shall be in the form of an offer letter from a person or persons that the Debtors in their sole discretion, but after consultation with the Lender, deem financially able to consummate the purchase of the Assets, which letter states:

(A) that such Qualified Bidder offers to purchase the Assets -- or only the Hotel or Parking Land, as applicable -- upon the terms and conditions set forth in an executed asset purchase agreement (hard copy and an electronic version in Word format and blacklined against the Stalking Horse Agreement), together with its exhibits and schedules, including terms relating to the proposed purchase price and the time of closing (the "Proposed Agreement");

(B) that such Qualified Bidder is prepared to consummate the transaction on or before _____, 2010, following the Court's entry

of an order confirming the Plan and approving the Plan Sale to the Successful Bidder (the "Confirmation Order");

(C) that such Qualified Bidder's offer is irrevocable until the earlier to occur of _____, 2010 or two (2) business days after the closing of the Plan Sale of the Assets; and

(D) which of the Debtors' unexpired leases and executory contracts are to be assumed in connection with the consummation of the Qualified Bidder's bid.

iii. All bids shall be accompanied by a cash deposit into escrow with the Debtors of an amount equal to five percent (5%) of such bidder's proposed purchase price (the "Good Faith Deposit").

iv. All bids shall be accompanied by satisfactory evidence, in the sole opinion of the Debtors, but after consultation with the Lender, of committed financing or other ability to perform all transactions contemplated by the Proposed Agreement.

v. All bids must provide for funding of all payments required under the Plan to be funded by the purchaser.

vi. All bids must identify the proposed management company for the Hotel, if applicable.

vii. All bids must identify the proposed brand for the Hotel if other than Radisson, if applicable.

viii. Bids cannot contain any financing conditions or contingencies (other than those set forth in the Stalking Horse Agreement).

ix. All bids must include information sufficient to determine whether the Potential Bidder can provide adequate assurance of future performance to counterparties to any executory contracts and unexpired leases to be assumed by the Potential Bidder.

d. **Due Diligence.** The Debtors and FBR, as applicable, shall afford each Potential Bidder (hereinafter defined) due diligence access to the Assets. Due diligence access may include management presentations as may be scheduled by the Debtors, access to data rooms, on site inspections and such other matters which a Potential Bidder may request and as to which the Debtors, in their sole discretion, but after consultation with the Lender, may agree. Neither the Debtors nor any of their affiliates (nor any of their respective representatives) are obligated to furnish any information relating to the

Assets to any person except to Potential Bidders. Potential Bidders are advised to exercise their own discretion before relying on any information regarding the Assets provided by anyone other than the Debtors or their representatives. To be a "Potential Bidder," each bidder must have delivered the following:

i. an executed confidentiality agreement in form and substance satisfactory to the Debtors; and

ii. current audited and unaudited financial statements or other financial information of the Potential Bidder, or, if the Potential Bidder is an entity formed for the purpose of acquiring the Assets, current audited and unaudited financial statements or other financial information of the Potential Bidder's equity holder or other financial backer, or such other form of financial disclosure and evidence acceptable to the Debtors and their advisors in their sole discretion, demonstrating such Potential Bidder's ability to close the proposed transaction, to fund the Plan, to finance going concern operations, and to provide adequate assurance of future performance to counterparties to any executory contracts and unexpired leases to be assumed by the Potential Bidder.

e. **"As Is, Where Is."** The sale of the Assets shall be on an "as is, where is" basis and without representations or warranties of any kind, nature, or description by the Debtors, their agents or estates, except to the extent set forth in the Proposed Agreement of the Successful Bidder. Except as otherwise provided in the Proposed Agreement, all of the Debtors' right, title and interest in and to the Assets to be acquired shall be sold pursuant to the Plan free and clear of all liens, claims, charges, security interests, restrictions and other encumbrances of any kind or nature thereon and there against (collectively, the "Transferred Liens"), with such Transferred Liens to be satisfied in accordance with the Plan. Each bidder shall be deemed to acknowledge and represent that it has relied solely upon its own independent review, investigation and/or inspection of any documents and/or Assets in making its bid, and that it did not rely upon any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express, implied, by operation of law or otherwise, regarding the Assets, or the completeness of any information provided in connection with the Assets, the Bidding Process or the Auction, except as expressly stated in these Bid Procedures or, as to the Successful Bidder, in the applicable Proposed Agreement.

f. **Stalking Horse.** The Stalking Horse has submitted a Qualified Bid pursuant to the

Stalking Horse Agreement, which Qualified Bid shall serve as a stalking horse bid (the "Stalking Horse Bid").

g. **Stalking Horse Bid Protections:** The Debtors hereby seek court authority for, and pursuant to such order would be required to: (i) either (x) provide a $1,425,000 break-up fee to the Stalking Horse, payable only in the event that an alternative transaction for the Assets closes and the Stalking Horse is not the Successful Bidder at the Auction, or (y) reimburse the Stalking Horse for its actual out of pocket expenses, including reasonable attorneys' fees and disbursements, up to a maximum of $250,000, payable only in the event that the Stalking Horse is the Successful Bidder and the Effective Date of the Plan shall not have occurred on or before December 31, 2010 or the Stalking Horse is otherwise entitled to terminate the Stalking Horse Agreement in accordance with the terms thereof before or after the Auction, other than pursuant to the due diligence termination right;[5] and (ii) provide that any initial competing Qualified Bids for the Assets must exceed the aggregate consideration to be paid to or

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[5] The Stalking Horse may terminate the Stalking Horse Agreement if, among other things, the deadlines for entry of orders approving the disclosure statement and confirming the Plan are not met, the Lenders obtain relief from the automatic stay or if any Court order granting this Motion and approving the Bid Procedures is modified, vacated or reversed in whole or in part.

for the benefit of the Debtors' estates as set forth in the Stalking Horse Bid by at least $1,675,000.

h. **Credit Bid**: The Plan Sale is being conducted under sections 1123(a) and (b) and 1129(b)(2)(A)(iii) of the Bankruptcy Code, and not section 363 of the Bankruptcy Code. As such, no holder of a lien on any assets of the Debtors shall be permitted to credit bid pursuant to section 363(k) of the Bankruptcy Code.

i. **Auction.** If the Debtors receive more than one Qualified Bid prior to the Bid Deadline, the Debtors shall conduct an auction (the "Auction") at the offices of Perkins Coie LLP, 131 S. Dearborn St., Ste. 1700, Chicago, IL 60603, on _____ 2010, beginning at __ a.m. (prevailing Chicago Time) or such later time or other place as the Debtors shall notify all Qualified Bidders who have submitted Qualified Bids. The Debtors may announce at the Auction additional procedural rules that are reasonable under the circumstances (*e.g.*, the amount of time allotted to make subsequent overbids) for conducting the Auction, so long as such rules are not inconsistent with these Bid Procedures. Based upon the terms of the Qualified Bids received, the number of Qualified Bidders participating in the Auction, and such other information as the Debtors determine is relevant, the Debtors, in their sole discretion, may conduct the

Auction in the manner they determine will achieve the maximum value for the Assets.

At the Auction, the minimum initial bid against the Stalking Horse Bid for the Assets in a single lot must exceed the value of the Stalking Horse Bid by $1,675,000. If bids are received for the purchase of just the Hotel and/or the Parking Land, the highest bids for the Hotel and the Parking Land combined must exceed the value of the Stalking Horse Bid by at least $1,675,000. If the highest bids received for the Hotel and the Parking Land combined do not exceed the value of the Stalking Horse Bid by at least $1,675,000, (i) those bidders that have bid on only the Hotel and/or the Parking Land shall not be deemed to be Qualified Bidders and shall not be permitted to participate in the Auction and (ii) the Auction shall proceed only with respect to the Assets in a single lot, if at all. Subsequent overbids, whether for the Assets in a single lot or for just the Hotel or Parking Land, shall be made in minimum increments of $250,000.

As soon as practicable after the conclusion of the Auction, the Debtors, in their sole discretion, but after consultation with the Lender, shall: (i) review each Qualified Bid on the basis of financial and contractual terms and the factors relevant to the sale process, including those factors affecting the speed and certainty of consummating the Plan Sale and confirming the Plan; and

(ii) identify the highest or otherwise best offer(s) for the Assets (a "Successful Bid") and any second-highest offer(s). The Debtors will present the Successful Bid(s) to the Bankruptcy Court for approval at the Confirmation Hearing. The Debtors reserve all rights to not submit any bid which is not acceptable to the Debtors in their sole discretion, but after consultation with the Lender.

j. **Acceptance of Qualified Bids**. The Debtors shall sell the Assets to the Stalking Horse or the Successful Bidder(s), as the case may be, submitting the highest or otherwise best Qualified Bid(s) at the Auction, after confirmation of the Plan and approval of such Qualified Bid(s) by the Bankruptcy Court at the Confirmation Hearing and upon the Plan's effective date. The Debtors' presentation to the Bankruptcy Court for approval of a particular Qualified Bid does not constitute the Debtors' acceptance of such Qualified Bid. The Debtors shall have accepted a Qualified Bid only when that Qualified Bid has been approved by the Bankruptcy Court at the Confirmation Hearing.

k. **The Confirmation Hearing**. After the conclusion of the Auction and the solicitation of the Plan, the Bankruptcy Court shall conduct a hearing (the "Confirmation Hearing") to confirm the Plan and approve the Plan Sale. At the Confirmation Hearing, the Debtors will seek entry of an order (the

"Confirmation Order"), among other things: (i) confirming the Plan; (ii) authorizing and approving the Plan Sale to the Successful Bidder(s), as determined by the Debtors in accordance with the Bid Procedures, pursuant to the terms and conditions set forth in the Proposed Agreement(s) submitted by the Successful Bidder(s) (as such agreement(s) may be modified prior to, during or after the Auction with the agreement of the Debtors); and (iii) exempting the sale and conveyance of the Assets from any transfer tax, stamp tax or similar tax pursuant to section 1146(c) of the Bankruptcy Code. The Confirmation Hearing may be adjourned or rescheduled without notice other than by an announcement of the adjourned date in open court.

Following the entry of the Confirmation Order approving the Plan Sale, if a Successful Bidder fails to consummate an approved sale because of a breach or failure to perform on the part of such Successful Bidder, the next highest or otherwise best Qualified Bid, as disclosed at the Confirmation Hearing, shall be deemed to be the Successful Bid and the Debtors shall be authorized to effectuate such sale without further order of the Bankruptcy Court.

l. **Return of Good Faith Deposit.** The Good Faith Deposits of all Qualified Bidders shall be retained by the Debtors and all Qualified Bids will remain open and irrevocable,

notwithstanding Bankruptcy Court approval of a sale pursuant to the terms of a Successful Bid by a Qualified Bidder, until the earlier to occur of _____, 2010 or two (2) business days after the closing of the Plan Sale of the Assets. If a Successful Bidder fails to consummate an approved sale because of a breach or failure to perform on the part of such Successful Bidder, the Debtors will not have any obligation to return the Good Faith Deposit deposited by such Successful Bidder, which shall be retained by the Debtors as liquidated damages.

m. **Modifications.** The Debtors may, in their sole discretion, but after consultation with the Lender: (i) determine, in their business judgment, which Qualified Bid(s), if any, constitute the highest or otherwise best offer for the Assets; (ii) consult with the representatives of the Lender or other significant constituent in connection with the Bidding Process and Bid Procedures; and (iii) reject at any time before entry of the Confirmation Order approving a Qualified Bid, any bid that, in the Debtors' sole discretion, but after consultation with the Lender, is: (x) inadequate or insufficient; (y) not in conformity with the requirements of the Plan, the Bankruptcy Code, the Bid Procedures, or the terms and conditions of sale; or (z) contrary to the best interests of the Debtors, their estates, their creditors and other parties in interest. At or before the Confirmation Hearing, the Bankruptcy

Court, or, consistent with the purposes of the Bid Procedures to obtain the highest or otherwise best offer(s) for the Assets, the Debtors may, in their sole discretion, but after consultation with the Lender, impose such other terms and conditions as it or they may determine to be in the best interests of the Debtors' estates, their creditors and other parties in interest.

n. **Reservation of Rights:** In addition to their rights set forth in sections (i) and (m) above, the Debtors may, in their sole discretion, but after consultation with the Lender, modify these Bid Procedures or impose, at or prior to the Auction, additional terms and conditions on the proposed Sale of the Assets if, in their reasonable judgment, such modifications would be in the best interests of the Debtors' estates and promote an open and fair sale process.

B. The Proposed Assumption and Assignment Procedures

21. To implement the Plan Sale of the Debtors' Assets to the Successful Bidder(s), the Debtors seek authorization to assume and assign certain contracts and unexpired leases in connection with the Plan Sale. To provide counterparties with adequate notice of such assumption and proposed adequate cure amounts (the "Cure Amounts"), the Debtors propose the following procedures (the "Assumption and Assignment

Procedures"), which also are attached as Addendum 2[6] to the proposed Bid Procedures Order:

a. Within five (5) days prior to the Bid Deadline, the Debtors shall file a schedule of cure obligations (the "Contract and Cure Schedule") listing all unexpired leases and executory contracts that the Stalking Horse intends to assume (the "Assigned Contracts") and the amount, if any, that the Debtors contend is the amount needed to pay to cure any defaults with respect to such Assigned Contracts (the "Cure Amounts").

b. Upon such filing, a copy of the Contract and Cure Schedule and these Assumption and Assignment Procedures shall be served on each of the counterparties to the Assigned Contracts listed on the Contract and Cure Schedule.

c. The Debtors shall amend the Contract and Cure Schedule promptly after the completion of the Auction to update the information contained therein with respect to the Successful Bid, and shall serve an amended Contract and Cure Schedule on each of the counterparties to the Assigned Contracts listed thereon.

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[6] To the extent the description of the Assumption and Assignment Procedures set forth herein differs from those set forth in Addendum 2 to the Bid Procedures Order, the terms of Addendum 2 to the Bid Procedures Order shall control.

d. Any objections ("Assignment Objections") to the assumption and assignment of any Assigned Contract, including, but not limited to, objections relating to adequate assurance of future performance or to the cure amount set forth in the Contract and Cure Schedule must be filed with the Bankruptcy Court and served upon the Debtors' counsel on or before 4:00 p.m. (prevailing Chicago Time) on the second business day before the Confirmation Hearing (the "Assignment Objection Deadline").

e. Any counterparty failing to file an Assignment Objection by the Assignment Objection Deadline shall be forever barred from: (i) objecting to the Cure Amount set forth on the Contract and Cure Schedule with respect to its Assigned Contract; (ii) seeking additional amounts arising under its Assigned Contract prior to the closing on the Plan Sale from the Debtors or the Successful Bidder; and (iii) objecting to the assumption and assignment of its Assigned Contract to the Successful Bidder.

f. Any Assignment Objections not consensually resolved prior to the Confirmation Hearing shall be heard at the Confirmation Hearing with any related Cure Amounts or adequate assurance of future performance being fixed by the Bankruptcy Court. All other objections to the proposed assumption and assignment of the Assigned Contracts will be heard at the Confirmation Hearing.

g. Except as may otherwise be agreed to by all parties to an Assigned Contract, on or before the Closing, the cure of any defaults under Assigned Contracts necessary to permit assumption and assignment thereof shall be by: (i) payment of the undisputed Cure Amount; and/or (ii) establishment of a reserve with respect to any disputed Cure Amount in an amount established by the Bankruptcy Court. Cure Amounts shall be paid by the Debtors from the Debtors' cash on hand.

22. The Debtors believe that the proposed Assumption and Assignment Procedures will provide the counterparties to the Assigned Contracts a full and fair opportunity to be heard with respect to issues concerning Cure Amounts and the proposed assumption and assignment of the Assigned Contracts.

BASES FOR RELIEF REQUESTED

A. Secured Creditors Do Not Have An Absolute Right To Credit Bid

23. The proposed Bid Procedures preclude secured creditors from submitting credit bids for the Assets pursuant to the Plan Sale. Precluding credit bidding is appropriate and permissible under the Bankruptcy Code in the context of the Plan Sale, as opposed to a sale outside the ordinary course of business under section 363(b) of the Bankruptcy Code.

24. The Bankruptcy Code provides two methods by which a debtor may sell substantially all of its assets. The first is a sale conducted pursuant to section 363(b)

of the Bankruptcy Code. The second is a sale pursuant to a plan. *See* 11 U.S.C. § 1123(b) ("Subject to subsection (a) of this section, a plan may - ... (4) provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests..."). Unless the court for cause orders otherwise, secured creditors are permitted to submit credit bids when a debtor sells its assets pursuant to section 363(b) of the Bankruptcy Code. *See* 11 U.S.C. § 363(k) ("At a sale under subsection (b) of this section . . . unless the court for cause orders otherwise the holder of [a secured claim] may bid at such sale . . .").

25. Unlike section 363(b) sales, the right to credit bid is not expressly granted to secured creditors when a debtor sells substantially all of its assets pursuant to a plan. For example, to be fair and equitable with respect to a class of impaired secured claims, a plan must provide:

> "(i) that the holders of [secured claims] retain the liens securing such claims . . . and . . . that each holder of a [secured claim] receives on account of such claim deferred cash payments totaling at least the allowed mount of such claim . . .;
>
> (ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing [the secured claims] . . . with such liens to attach to the proceeds of such sale . . .; or
>
> (iii) for the realization by such holders of the indubitable equivalent of [the secured claims].

11 U.S.C. § 1129(b)(2)(A). Though subsection (ii) provides a secured creditor with the right to credit bid if a debtor seeks confirmation under that subsection, sections 1129(b)(2)(A)(ii) and (iii) are to be read in the disjunctive and a debtor may seek to confirm its plan under subsection (iii) without providing a right to credit bid pursuant to a plan sale. *See id.*

26. Case law also supports the proposition that secured creditors do not have an absolute right to credit bid at a sale under a plan. *See In re Philadelphia Newspapers, LLC*, 599 F.3d 298 (3d Cir. 2010); *In re The Pacific Lumber Co.*, 584 F.3d 229 (5th Cir. 2009); *In re CRIIMI MAE, Inc.*, 251 B.R. 796 (Bankr. D. Md. 2000). The United States Courts of Appeals for both the Fifth and Third Circuits have concluded that a secured creditor does not have an absolute right to credit bid if the debtor proposes to sell its assets pursuant to a plan and pursues plan confirmation under section 1129(b)(2)(A)(iii) of the Bankruptcy Code. *See Philadelphia Newspapers*, 599 F.3d at 312 (holding that "a debtor may proceed with a sale under subsection (iii) without permitting secured lenders to credit bid."); *Pacific Lumber*, 584 F.3d at 246 (recognizing that "[a]lthough a credit bid option might render Clause (ii) imperative in some cases, it is unnecessary here because the plan offered a cash payment to the Noteholders. Clause (iii) thus affords a distinct basis for confirming a plan if it offered the Noteholders the 'realization . . . of the indubitable equivalent of such claims.'"); *see also CRIIMI MAE*, 251 B.R. at 806-07 (holding that a plan may be confirmed by satisfying section 1129(b)(2)(A)(iii) without providing a secured creditor the right to credit bid).

27. Here, the Debtors are proposing to sell their Assets pursuant to the Plan and seek confirmation of the Plan under section 1129(b)(2)(A)(iii) of the Bankruptcy Code. Indeed, the Debtors believe that the Lender will realize the indubitable equivalent of its secured claim under the Plan as required by section 1129(b)(2)(A)(iii) of the Bankruptcy Code. Thus, based upon the plain language of the Bankruptcy Code and established case law, the Debtors' secured creditors should be precluded from submitting credit bids for the purchase of the Debtors' Assets.

B. The Debtors' Secured Creditors Should Be Precluded From Submitting Credit Bids For Cause

28. Even if the Court rejects the Debtors' request to preclude credit bidding under section 1129(b)(2)(A)(iii) of the Bankruptcy Code, the Debtors' secured creditors should nevertheless be precluded from submitting credit bids for cause. As set forth above, secured creditors may submit credit bids in connection with section 363(b) sales "unless the court for cause orders otherwise." 11 U.S.C. § 363(k). Courts have discretion to deny credit bidding and though "cause" is not defined by the Bankruptcy Code, "it is intended to be a flexible concept enabling a court to fashion an appropriate remedy on a case-by-case basis." *In re NJ Affordable Homes Corp.*, 2006 WL 2128624, *16 (Bankr. D. N.J. June 29, 2006).

29. As set forth above, the Lender precipitated the Debtors' Chapter 11 Cases by improperly terminating the Debtors' funding under the Loan. The Lender was at all times aware of the increased budget for the construction of the larger parking structure and

expressly approved and funded construction draw requests throughout the course of the Loan until the Lender (or at least SDNB) apparently began experiencing its own financial difficulty, at which time the Lender alleged a default on the part of the Debtors to terminate all funding under the Loan. As a result: (a) the Debtors and their assets have been exposed to mechanic's lien claims in excess of $15,000,000; (b) Gateway Deck has been unable to complete and sell its parking structure to at least partially repay the Lender; (c) the Debtors have been forced to engage in the Enterprise Litigation, which has been and will likely continue to be costly and which could jeopardize the Debtors' Chapter 11 Cases; and (d) the Hotel's ability to adequately service group business bookings has been impaired due to the resulting lack of on-site parking and the Hotel's ability to operate parking operations profitably has been rendered impossible due to the costs of obtaining off-site parking. Had the Lender not terminated the Debtors' funding, Gateway Deck could have at least partially repaid the Lender by now as a result of the sale of its parking structure. Instead, the Lender has substantially impaired and delayed its own ability to realize any value from the disposition of the Debtors' Assets. It would therefore be unjust to permit the Lender to acquire the Assets pursuant to a credit bid based on its prior conduct.

30. Furthermore, U.S. Bank, which has succeeded to all of SDNB's rights and obligations under the Loan pursuant to the SDNB Agreement, will be compensated by the FDIC for most of the losses it sustains in connection with the Loan. Thus, any policy considerations that might support credit bidding on the part of secured creditors do not apply in U.S. Bank's case. To the contrary, U.S. Bank should have

no incentive to acquire an ownership interest in the Assets through a credit bid but, rather, be motivated to achieve the highest and best price for the Assets pursuant to the fair and open sale process contemplated by the Debtors.

31. In addition, granting an undersecured creditor the right to credit bid may result in chilling the bidding process because potential bidders may not be willing to devote the time and resources necessary to conduct due diligence if an undersecured creditor is able to dominate the process by bidding the full amount of its secured and unsecured claims. *See e.g.*, 3 COLLIER ON BANKRUPTCY ¶ 363.09[1] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev.) ("The *court might* [deny credit bidding if] permitting the lienholder to bid would chill the bidding process."). Here, the Lender's claim far exceeds the Purchase Price under the Stalking Horse Agreement. Therefore, if the Lender is permitted to credit bid, additional potential bidders may be dissuaded from participating in the Plan Sale if the Lender can bid the full amount of its claim.

32. Moreover, if the Lender is permitted to credit bid at the Plan Sale, the Stalking Horse has informed the Debtors that it will not proceed with the Stalking Horse Agreement, thereby jeopardizing the Debtors' ability to make a distribution to all of their creditors pursuant to the terms of the Plan. Thus, not only would precluding credit bidding constitute the correct *result, but also it is the fair result. If the Lender, or* any other secured creditors for that matter, wants to acquire the Assets, it should do so by participating in the Auction and paying cash for the Assets just the same as the Stalking Horse is prepared to do. Indeed,

that is exactly what the lenders successfully did in the *Philadelphia Newspapers* case. Therefore, the Court should preclude all of the Debtors' secured creditors from submitting credit bids in connection with the Plan Sale for cause under section 363(k) of the Bankruptcy Code.

C. The Court Should Approve the Bid Procedures

33. The Debtors' business judgment is entitled to substantial deference with respect to the procedures to be used in selling assets from the estate. *See, e.g., In re Integrated Res., Inc.*, 147 B.R. 650, 656-57 (S.D.N.Y. 1992) (noting that overbid procedures and break-up fee arrangements that have been negotiated by a debtor are to be reviewed according to the deferential "business judgment" standard, under which such procedures and arrangements are "presumptively valid"); *In re 995 Fifth Ave. Assocs., L.P.*, 96 B.R. 24, 28 (Bankr. S.D.N.Y. 1989) (same).

34. The paramount goal in any proposed sale of property of the estate is to maximize the proceeds received by the estate. *See, e.g., Four B. Corp. v. Food Barn Stores, Inc. (In re Food Barn Stores, Inc.)*, 107 F.3d 558, 564-65 (8th Cir. 1997) (in bankruptcy sales, "a primary objective of the Code [is] to enhance the value of the estate at hand); *Integrated Res.*, 147 B.R. at 659 ("'It is a well-established principle of bankruptcy law that the ... [Debtor's] duty with respect to such sales is to obtain the highest price or greatest overall benefit possible for the estate.'") (quoting *Cello Bay Co. v. Champion Int'l Corn. (In re Atlanta Packaging Prods., Inc.)*, 99 B.R. 124, 131 (Bankr. N.D. Ga. 1988)). Thus, courts recognize that

procedures intended to enhance competitive bidding are consistent with the goal of maximizing the value received by the estate and therefore are appropriate in the context of bankruptcy sales. *See, e.g., Integrated Res.*, 147 B.R. at 659 (such procedures "encourage bidding and maximize the value of the debtor's assets").

35. The Debtors submit that the proposed Bid Procedures are appropriate under the circumstances, including (a) the proposed break-up fee in the amount of $1,425,000 to be paid to the Stalking Horse in the event the Debtors close on the sale of the Assets to a purchaser other than the Stalking Horse (the "Break-Up Fee") or (b) reimbursement of the Stalking Horse's actual out of pocket expenses, including reasonable attorneys' fees and disbursements, up to a maximum of $250,000, payable in the event that the Effective Date of the Plan shall not have occurred on or before December 31, 2010 or the Stalking Horse is otherwise entitled to terminate the Stalking Horse Agreement in accordance with the terms thereof, other than pursuant to the due diligence termination right (the "Expense Reimbursement"). For example, the Break-Up Fee totals only three percent (3%) of the Purchase Price under the Stalking Horse Agreement, which is reasonable and customary in this jurisdiction, and it will not be paid to the Stalking Horse unless the Debtors accept and close on a higher and better offer for the Assets. Because any initial competing bids for the Assets must, among other things, total at least the purchase price under the Stalking Horse Agreement, plus the amount of the Break-Up Fee and a $250,000 overbid, payment of the Break-Up Fee will not diminish the Debtors' estate. Moreover, the Expense Reimbursement is fair and will not be paid in addition

to the Break-Up Fee, but only as an alternative to the Break-Up Fee in the event that (x) the Stalking Horse incurs actual out of pocket costs conducting due diligence and otherwise pursuing the purchase of the Assets and (y) among other things, the Debtors are unable to meet the deadlines in the Stalking Horse Agreement or confirm the Plan, or the Stalking Horse is entitled to terminate the Stalking Horse Agreement in accordance with the terms thereof before or after the Auction, other than pursuant to the Stalking Horse's termination right during its due diligence period.

36. The Bid Procedures, including, without limitation, the Break-Up Fee, the Expense Reimbursement, and the inability of secured creditors to credit bid, are all necessary to provide the Stalking Horse with an incentive for entering into the Stalking Horse Agreement. In fact, without these protections, the Stalking Horse would be unwilling to proceed pursuant to the Stalking Horse Agreement. The proposed Bid Procedures are therefore reasonable, appropriate, and within the Debtors' sound business judgment under the circumstances because they will serve to maximize the value that the Debtors will recover on account of the Plan Sale and they will enable the Debtors to fund and confirm the Plan.

D. The Auction, Hearing and Notice Procedures Are Appropriate

37. Pursuant to Bankruptcy Rule 2002, the Debtors are required to provide creditors with twenty-one (21) days' notice of the Plan Sale and twenty-five (25) days' notice of the Confirmation Hearing. Pursuant to Bankruptcy Rule 2002(c), the Debtors are

required to notify their creditors of the proposed sale of the Debtors' assets, including a disclosure of the time and place of the Confirmation Hearing, the terms and conditions of the Plan Sale, and the deadline for filing any objections.

38. The Debtors propose that within seven days following entry of the Bid Procedures Order, the Debtors will distribute a Notice of Sale of Assets in the form of Addendum 3 to the proposed order attached hereto (the "Sale Notice") and the Bid Procedures Order to: (a) the Office of the United States Trustee; (b) counsel to the Debtors' Lender; (c) those parties that have requested notice of all pleadings in the Debtors' Chapter 11 Cases pursuant to Bankruptcy Rule 2002; and (e) any known prospective bidders and other parties previously contacted by FBR or that have expressed any interest in the Assets to FBR. In addition, within seven days following entry of the Bid Procedures Order, the Debtors will serve the Sale Notice by first class mail upon all of the Debtors' known creditors.

39. Further, if the Bankruptcy Court believes it is appropriate, the Debtors will publish an abbreviated version of the Sale Notice at least once in the national edition of The Wall Street Journal and the Los Angeles Times at least twenty days prior to the Auction. The Debtors contend that such notice of the Auction is good and sufficient notice and that no other or further notice thereof is required.

NOTICE

40. Notice of this Motion and a copy of this Motion have been served upon: (a) the Office of the United

States Trustee; (b) counsel to Lender; (c) the Debtors' 20 largest unsecured creditors; and (d) those parties that have requested notice of all pleadings in the Debtors' Chapter 11 Cases pursuant to Bankruptcy Rule 2002.

41. The Debtors submit that good and sufficient notice of this Motion has been provided and no other or further notice need be provided.

WHEREFORE, the Debtors respectfully request (a) entry of the Bid Procedures Order, substantially in the form attached hereto as Exhibit A; and (B) such other and further relief as the Court deems just and proper.[7]

Dated: June 4, 2010

RADLAX GATEWAY HOTEL, LLC and RADLAX GATEWAY DECK, LLC

By: /s/ Brian A. Audette

PERKINS COIE LLP
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Attorneys for the Debtors

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[7] To the extent this Motion is construed as a "brief" under Local Rule 5005-3(C), the Debtors request that the Court waive the 15-page limitation contained in Local Rule 5005-3(C).

CERTIFICATE OF SERVICE

Brian A. Audette, an attorney, hereby certifies that on June 4, 2010 he caused a copy of the *Notice of Motion* and *Debtors' Motion for an Order: (A) approving procedures for the sale of substantially all of the Debtors' assets; (B) scheduling an auction; (C) approving assumption and assignment procedures; (D) approving form of notice; and (E) granting related relief* to be filed via the Court's ECF system and served on the parties listed on the attached Service List, as so indicated.

/s/ Brian A. Audette

* * *

EXHIBIT A

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Case No. 09-30047
Chapter 11
(Jointly Administered)

Hon. Bruce W. Black

ORDER: (A) APPROVING PROCEDURES FOR THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS; (B) SCHEDULING AN AUCTION; (C) APPROVING ASSUMPTION AND ASSIGNMENT PROCEDURES; (D) APPROVING FORM OF NOTICE; AND (E) GRANTING RELATED RELIEF

THIS CAUSE COMING TO BE HEARD upon Debtors' Motion for an Order: (A) Approving Procedures for the Sale of Substantially all of the Debtors' Assets; (B) Scheduling an Auction; (C) Approving Assumption and Assignment Procedures; (D) Approving Form of Notice; and (E) Granting Related Relief (the "Motion");[1] the Court having found that due and proper notice of the Motion has been given; the Court having found that it has jurisdiction over the Motion; and it appearing that the relief requested in the Motion is in the best interests of the Debtors, their estates, their creditors, and all

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[1] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion.

other parties in interest; and upon the record of the hearing to approve the Motion, and after due deliberation thereon, and good cause appearing therefore;

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED.

2. The Bid Procedures, substantially in the form attached hereto as Addendum 1, are approved and the Debtors are authorized to take any and all actions necessary and/or appropriate to implement the Bid Procedures.

3. The Debtors are authorized and directed to pay to the Stalking Horse the Break-Up Fee and/or Expense Reimbursement, as applicable, from the Debtors' cash on hand, whether or not such cash constitutes the Lender's cash collateral.

4. None of the Debtors' secured creditors, including, without limitation, the Lender, shall be permitted to submit credit bids for the purchase of the Debtors' Assets.

5. As provided in the Bid Procedures, the Debtors are authorized to conduct the Auction on _____, 2010 at _____ a.m. prevailing Chicago Time at the offices of Perkins Coie LLP, 131 S. Dearborn St., Ste. 1700, Chicago, Illinois 60603.

6. The Assumption and Assignment Procedures substantially in the form attached hereto as Addendum 2 are approved and the Debtors are authorized to take any and all actions necessary and/or

appropriate to implement the Assumption and Assignment Procedures.

7. The form of Sale Notice attached hereto as Addendum 3 is hereby approved as sufficient.

8. Within seven days after entry of this Order, the Debtors: (a) shall publish notice of the Plan Sale and the time and place of the proposed Auction in the Los Angeles Times and the National Edition of the Wall Street Journal and such other publications as the Debtors determine will reasonably promote the marketing and sale of the Assets; (b) shall provide a copy of the Sale Notice and this Order to (i) the Debtors' 20 largest unsecured creditors; (ii) the Office of the United States Trustee; (iii) counsel to the Debtors' Lender; (iv) those parties that have requested notice of all pleadings in the Debtors' chapter 11 cases pursuant to Bankruptcy Rule 2002; and (v) any known prospective bidders at the Auction, including, but not limited to, those parties previously contacted by FBR or that have previously expressed any interest in the Assets to FBR; and (c) serve the Sale Notice by first class mail on all of the Debtors' known creditors.

9. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order.

10. Notwithstanding the possible applicability of Bankruptcy Rules 6004, 6006, 7062, 9014 or otherwise, the terms and conditions of this Order shall be immediately effective and enforceable.

Dated: _____, 2010

_____
United States Bankruptcy Judge

ORDER ADDENDUM 1

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Case No. 09-30047
Chapter 11
(Jointly Administered)

Hon. Bruce W. Black

ADDENDUM 1 TO ORDER: (A) APPROVING PROCEDURES FOR THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS; (B) SCHEDULING AN AUCTION; (C) APPROVING ASSUMPTION AND ASSIGNMENT PROCEDURES; (D) APPROVING FORM OF NOTICE; AND (E) GRANTING RELATED RELIEF

BID PROCEDURES

Set forth below is the general process to be employed by the Debtors with respect to the proposed Plan Sale of substantially all of the Debtors' assets (the "Assets"), as described more fully in the Debtors' Motion for an Order: (A) Approving Procedures for the Sale of Substantially all of the Debtors' Assets; (B) Scheduling an Auction; (C) Approving Assumption and Assignment Procedures; (D) Approving Form of Notice; and (E) Granting Related Relief (the "Motion").[1]

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[1] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion.

a. **The Assets.** The Debtors are offering the Assets for sale pursuant to the Plan, which includes the Real Property. The Assets will be sold as a single lot or two separate lots, which separate lots shall consist of the Hotel and the Parking Land. The Debtors shall retain all rights and title to their assets that are not subject to any bid(s) accepted by the Debtors and approved by the Bankruptcy Court at the Confirmation Hearing (defined below).

b. **The Bidding Process.** The Debtors shall in their sole discretion, but after consultation with their advisors and the Lender: (i) determine whether any person is a Potential Bidder (hereinafter defined); (ii) coordinate the efforts of Potential Bidders in conducting their respective due diligence investigations regarding the Debtors' business and assets; (iii) receive offers from Qualified Bidders (hereinafter defined); and (iv) negotiate any offer made to purchase the Assets (collectively, the "Bidding Process"). Neither the Debtors nor their representatives shall be obligated to furnish any information of any kind whatsoever relating to the Assets to any person who is not a Potential Bidder.

c. **Participation Requirements.** Unless otherwise ordered by the Bankruptcy Court, for cause shown, or as otherwise determined by the Debtors in their sole discretion, but after consultation with the Lender, in order to participate in the Bidding Process each person (a "Qualified Bidder") must submit a bid that

adheres to the following requirements (a "Qualified Bid"):

i. All bids must be submitted to Kevin Phillips and Jim O'Brien of FBR Capital Markets & Co., 237 Park Avenue, 19th Floor, New York, New York 10017, with copies to David M. Neff, Perkins Coie LLP, 131 S. Dearborn St., Ste. 1700, Chicago, Illinois 60603, not later than 5:00 p.m. (prevailing Chicago Time) on or before _____, 2010 (the "Bid Deadline"). The Debtors shall immediately distribute by facsimile transmission or electronic mail a copy of each bid received to counsel for the Lender.

ii. All bids shall be in the form of an offer letter from a person or persons that the Debtors in their sole discretion, but after consultation with the Lender, deem financially able to consummate the purchase of the Assets, which letter states:

(A) that such Qualified Bidder offers to purchase the Assets -- or only the Hotel or Parking Land, as applicable -- upon the terms and conditions set forth in an executed asset purchase agreement (hard copy and an electronic version in Word format and blacklined against the Stalking Horse Agreement), together with its exhibits and schedules, including terms relating to the proposed purchase price and the time of closing (the "Proposed Agreement");

(B) that such Qualified Bidder is prepared to consummate the transaction on or before _____, 2010, following the Court's entry of an order confirming the Plan and approving the Plan Sale to the Successful Bidder (the "Confirmation Order");

(C) that such Qualified Bidder's offer is irrevocable until the earlier to occur of _____, 2010 or two (2) business days after the closing of the Plan Sale of the Assets; and

(D) which of the Debtors' unexpired leases and executory contracts are to be assumed in connection with the consummation of the Qualified Bidder's bid.

(iii). All bids shall be accompanied by a cash deposit into escrow with the Debtors of an amount equal to five percent (5%) of such bidder's proposed purchase price (the "Good Faith Deposit").

(iv.) All bids shall be accompanied by satisfactory evidence, in the sole opinion of the Debtors, but after consultation with the Lender, of committed financing or other ability to perform all transactions contemplated by the Proposed Agreement.

(v.) All bids must provide for funding of all payments required under the Plan to be funded by the purchaser.

(vi.) All bids must identify the proposed management company for the Hotel, if applicable.

(vii.) All bids must identify the proposed brand for the Hotel if other than Radisson, if applicable.

(viii.) Bids cannot contain any financing conditions or contingencies (other than those set forth in the Stalking Horse Agreement).

(ix.) All bids must include information sufficient to determine whether the Potential Bidder can provide adequate assurance of future performance to counterparties to any executory contracts and unexpired leases to be assumed by the Potential Bidder.

d. **Due Diligence**. The Debtors and FBR, as applicable, shall afford each Potential Bidder (hereinafter defined) due diligence access to the Assets. Due diligence access may include management presentations as may be scheduled by the Debtors, access to data rooms, on site inspections and such other matters which a Potential Bidder may request and as to which the Debtors, in their sole discretion, but after consultation with the Lender, may agree. Neither the Debtors nor any of their affiliates

(nor any of their respective representatives) are obligated to furnish any information relating to the Assets to any person except to Potential Bidders. Potential Bidders are advised to exercise their own discretion before relying on any information regarding the Assets provided by anyone other than the Debtors or their representatives. To be a "Potential Bidder," each bidder must have delivered the following:

i. an executed confidentiality agreement in form and substance satisfactory to the Debtors; and

ii. current audited and unaudited financial statements or other financial information of the Potential Bidder, or, if the Potential Bidder is an entity formed for the purpose of acquiring the Assets, current audited and unaudited financial statements or other financial information of the Potential Bidder's equity holder or other financial backer, or such other form of financial disclosure and evidence acceptable to the Debtors and their advisors in their sole discretion, demonstrating such Potential Bidder's ability to close the proposed transaction, to fund the Plan, to finance going concern operations, and to provide adequate assurance of future performance to counterparties to any executory contracts and unexpired leases to be assumed by the Potential Bidder.

e. **"As Is, Where Is."** The sale of the Assets shall be on an "as is, where is" basis and without

representations or warranties of any kind, nature, or description by the Debtors, their agents or estates, except to the extent set forth in the Proposed Agreement of the Successful Bidder. Except as otherwise provided in the Proposed Agreement, all of the Debtors' right, title and interest in and to the Assets to be acquired shall be sold pursuant to the Plan free and clear of all liens, claims, charges, security interests, restrictions and other encumbrances of any kind or nature thereon and there against (collectively, the "Transferred Liens"), with such Transferred Liens to be satisfied in accordance with the Plan. Each bidder shall be deemed to acknowledge and represent that it has relied solely upon its own independent review, investigation and/or inspection of any documents and/or Assets in making its bid, and that it did not rely upon any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express, implied, by operation of law or otherwise, regarding the Assets, or the completeness of any information provided in connection with the Assets, the Bidding Process or the Auction, except as expressly stated in these Bid Procedures or, as to the Successful Bidder, in the applicable Proposed Agreement.

f. **Stalking Horse.** The Stalking Horse has submitted a Qualified Bid pursuant to the Stalking Horse Agreement, which Qualified Bid shall serve as a stalking horse bid (the "Stalking Horse Bid").

g. **Stalking Horse Bid Protections:** The Debtors shall either (x) provide a $1,425,000 break-up fee to the Stalking Horse, payable only in the event that an alternative transaction for the Assets closes and the Stalking Horse is not the Successful Bidder at the Auction, or (y) reimburse the Stalking Horse for its actual out of pocket expenses, including reasonable attorneys' fees and disbursements, up to a maximum of $250,000, payable only in the event that the Stalking Horse is the Successful Bidder and the Effective Date of the Plan shall not have occurred on or before December 31, 2010 or the Stalking Horse is otherwise entitled to terminate the Stalking Horse Agreement in accordance with the terms thereof before or after the Auction, other than pursuant to the due diligence termination right. Moreover, any initial competing Qualified Bids for the Assets must exceed the aggregate consideration to be paid to or for the benefit of the Debtors' estates as set forth in the Stalking Horse Bid by at least $1,675,000.

h. **Credit Bid**: The Plan Sale is being conducted under sections 1123(a) and (b) and 1129(b)(2)(A)(iii) of the Bankruptcy Code, and not section 363 of the Bankruptcy Code. As such, no holder of a lien on any assets of the Debtors shall be permitted to credit bid pursuant to section 363(k) of the Bankruptcy Code.

i. **Auction.** If the Debtors receive more than one Qualified Bid prior to the Bid Deadline, the Debtors shall conduct an auction (the "Auction")

at the offices of Perkins Coie LLP, 131 S. Dearborn St., Ste. 1700, Chicago, IL 60603, on _____, 2010, beginning at ____ a.m. (prevailing Chicago Time) or such later time or other place as the Debtors shall notify all Qualified Bidders who have submitted Qualified Bids. The Debtors may announce at the Auction additional procedural rules that are reasonable under the circumstances (*e.g.*, the amount of time allotted to make subsequent overbids) for conducting the Auction, so long as such rules are not inconsistent with these Bid Procedures. Based upon the terms of the Qualified Bids received, the number of Qualified Bidders participating in the Auction, and such other information as the Debtors determine is relevant, the Debtors, in their sole discretion, may conduct the Auction in the manner they determine will achieve the maximum value for the Assets.

At the Auction, the minimum initial bid against the Stalking Horse Bid for the Assets in a single lot must exceed the value of the Stalking Horse Bid by $1,675,000. If bids are received for the purchase of just the Hotel and/or the Parking Land, the highest bids for the Hotel and the Parking Land combined must exceed the value of the Stalking Horse Bid by at least $1,675,000. If the highest bids received for the Hotel and the Parking Land combined do not exceed the value of the Stalking Horse Bid by at least $1,675,000, (i) those bidders that have bid on only the Hotel and/or the Parking Land shall not be deemed to be Qualified Bidders and shall not be permitted to participate in the Auction

and (ii) the Auction shall proceed only with respect to the Assets in a single lot, if at all. Subsequent overbids, whether for the Assets in a single lot or for just the Hotel or Parking Land, shall be made in minimum increments of $250,000.

As soon as practicable after the conclusion of the Auction, the Debtors, in their sole discretion, but after consultation with the Lender, shall: (i) review each Qualified Bid on the basis of financial and contractual terms and the factors relevant to the sale process, including those factors affecting the speed and certainty of consummating the Plan Sale and confirming the Plan; and (ii) identify the highest or otherwise best offer(s) for the Assets (a "Successful Bid") and any second-highest offer(s). The Debtors will present the Successful Bid(s) to the Bankruptcy Court for approval at the Confirmation Hearing. The Debtors reserve all rights to not submit any bid which is not acceptable to the Debtors in their sole discretion, but after consultation with the Lender.

j. **Acceptance of Qualified Bids.** The Debtors shall sell the Assets to the Stalking Horse or the Successful Bidder(s), as the case may be, submitting the highest or otherwise best Qualified Bid(s) at the Auction, after confirmation of the Plan and approval of such Qualified Bid(s) by the Bankruptcy Court at the Confirmation Hearing and upon the Plan's effective date. The Debtors' presentation to the Bankruptcy Court for approval of a particular

Qualified Bid does not constitute the Debtors' acceptance of such Qualified Bid. The Debtors shall have accepted a Qualified Bid only when that Qualified Bid has been approved by the Bankruptcy Court at the Confirmation Hearing.

k. **The Confirmation Hearing.** After the conclusion of the Auction and the solicitation of the Plan, the Bankruptcy Court shall conduct a hearing (the "Confirmation Hearing") to confirm the Plan and approve the Plan Sale. At the Confirmation Hearing, the Debtors will seek entry of an order (the "Confirmation Order"), among other things: (i) confirming the Plan; (ii) authorizing and approving the Plan Sale to the Successful Bidder(s), as determined by the Debtors in accordance with the Bid Procedures, pursuant to the terms and conditions set forth in the Proposed Agreement(s) submitted by the Successful Bidder(s) (as such agreement(s) may be modified prior to, during or after the Auction with the agreement of the Debtors); and (iii) exempting the sale and conveyance of the Assets from any transfer tax, stamp tax or similar tax pursuant to section 1146(c) of the Bankruptcy Code. The Confirmation Hearing may be adjourned or rescheduled without notice other than by an announcement of the adjourned date in open court.

Following the entry of the Confirmation Order approving the Plan Sale, if a Successful Bidder fails to consummate an approved sale because of a breach or failure to perform on the part of such Successful Bidder, the next highest or otherwise best Qualified Bid, as disclosed at the

Confirmation Hearing, shall be deemed to be the Successful Bid and the Debtors shall be authorized to effectuate such sale without further order of the Bankruptcy Court.

l. **Return of Good Faith Deposit.** The Good Faith Deposits of all Qualified Bidders shall be retained by the Debtors and all Qualified Bids will remain open and irrevocable, notwithstanding Bankruptcy Court approval of a sale pursuant to the terms of a Successful Bid by a Qualified Bidder, until the earlier to occur of _____, 2010 or two (2) business days after the closing of the Plan Sale of the Assets. If a Successful Bidder fails to consummate an approved sale because of a breach or failure to perform on the part of such Successful Bidder, the Debtors will not have any obligation to return the Good Faith Deposit deposited by such Successful Bidder, which shall be retained by the Debtors as liquidated damages.

m. **Modifications.** The Debtors may, in their sole discretion, but after consultation with the Lender: (i) determine, in their business judgment, which Qualified Bid(s), if any, constitute the highest or otherwise best offer for the Assets; (ii) consult with the representatives of the Lender or other significant constituent in connection with the Bidding Process and Bid Procedures; and (iii) reject at any time before entry of the Confirmation Order approving a Qualified Bid, any bid that, in the Debtors' sole discretion, but after consultation with the Lender, is: (x) inadequate or insufficient; (y) not in conformity with the requirements of the Plan,

the Bankruptcy Code, the Bid Procedures, or the terms and conditions of sale; or (z) contrary to the best interests of the Debtors, their estates, their creditors and other parties in interest. At or before the Confirmation Hearing, tbe Bankruptcy Court, or, consistent with the purposes of the Bid Procedures to obtain the highest or otherwise best offer(s) for the Assets, the Debtors may, in their sole discretion, but after consultation with the Lender, impose such other terms and conditions as it or they may determine to be in the best interests of the Debtors' estates, their creditors and other parties in interest

n. **Reservation of Rights:** In addition to their rights set forth in sections (i) and (m) above, the Debtors may, in their sole discretion, but after consultation with the Lender, modify these Bid Procedures or impose, at or prior to the Auction, additional terms and conditions on the proposed Sale of the Assets if, in their reasonable judgment, such modifications would be in the best interests of the Debtors' estates and promote an open and fair sale process.

ORDER ADDENDUM 2

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Case No. 09-30047
Chapter 11
(Jointly Administered)

Hon. Bruce W. Black

ADDENDUM 2 TO ORDER: (A) APPROVING PROCEDURES FOR THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS; (B) SCHEDULING AN AUCTION; (C) APPROVING ASSUMPTION AND ASSIGNMENT PROCEDURES; (D) APPROVING FORM OF NOTICE; AND (E) GRANTING RELATED RELIEF

ASSUMPTION AND ASSIGNMENT PROCEDURES

Set forth below are the assumption and assignment procedures (the "Assumption and Assignment Procedures") to be employed with respect to the proposed Plan Sale as described more fully in the Debtors' Motion for an Order: (A) Approving Procedures for the Sale of Substantially all of the Debtors' Assets; (B) Scheduling an Auction; (C) Approving Assumption and Assignment

Procedures; (D) Approving Form of Notice; and (E) Granting Related Relief (the "Motion").[1]

a. Within five (5) days prior to the Bid Deadline, the Debtors shall file a schedule of cure obligations (the "Contract and Cure Schedule") listing all unexpired leases and executory contracts that the Stalking Horse intends to assume (the "Assigned Contracts") and the amount, if any, that the Debtors contend is the amount needed to pay to cure any defaults with respect to such Assigned Contracts (the "Cure Amounts").

b. Upon such filing, a copy of the Contract and Cure Schedule and these Assumption and Assignment Procedures shall be served on each of the counterparties to the Assigned Contracts listed on the Contract and Cure Schedule.

c. The Debtors shall amend the Contract and Cure Schedule promptly after the completion of the Auction to update the information contained therein with respect to the Successful Bid, and shall serve an amended Contract and Cure Schedule on each of the counterparties to the Assigned Contracts listed thereon.

d. Any objections ("Assignment Objections") to the assumption and assignment of any Assigned Contract, including, but not limited to, objections relating to adequate assurance of

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[1] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion.

future performance or to the cure amount set forth in the Contract and Cure Schedule must be filed with the Bankruptcy Court and served upon the Debtors' counsel on or before 4:00 p.m. (prevailing Chicago Time) on the second business day before the Confirmation Hearing (the "Assignment Objection Deadline").

e. Any counterparty failing to file an Assignment Objection by the Assignment Objection Deadline shall be forever barred from: (i) objecting to the Cure Amount set forth on the Contract and Cure Schedule with respect to its Assigned Contract; (ii) seeking additional amounts arising under its Assigned Contract prior to the closing on the Plan Sale from the Debtors or the Successful Bidder; and (iii) objecting to the assumption and assignment of its Assigned Contract to the Successful Bidder.

f. Any Assignment Objections not consensually resolved prior to the Confirmation Hearing shall be heard at the Confirmation Hearing with any related Cure Amounts or adequate assurance of future performance being fixed by the Bankruptcy Court. All other objections to the proposed assumption and assignment of the Assigned Contracts will be heard at the Confirmation Hearing.

g. Except as may otherwise be agreed to by all parties to an Assigned Contract, on or before the Closing, the cure of any defaults under Assigned Contracts necessary to permit assumption and assignment thereof shall be by: (i) payment of the undisputed Cure Amount;

and/or (ii) establishment of a reserve with respect to any disputed Cure Amount in an amount established by the Bankruptcy Court. Cure Amounts shall be paid by the Debtors from the Debtors' cash on hand.

ORDER ADDENDUM 3

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Case No. 09-30047
Chapter 11
(Jointly Administered)

Hon. Bruce W. Black

ADDENDUM 3 TO ORDER: (A) APPROVING PROCEDURES FOR THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS; (B) SCHEDULING AN AUCTION; (C) APPROVING ASSUMPTION AND ASSIGNMENT PROCEDURES; (D) APPROVING FORM OF NOTICE; AND (E) GRANTING RELATED RELIEF

NOTICE OF BID DEADLINE AND AUCTION IN CONNECTION WITH THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS

PLEASE TAKE NOTICE that, on June 4, 2010, RadLAX Gateway Hotel, LLC ("Gateway Hotel") and RadLAX Gateway Deck, LLC ("Gateway Deck" and together with Gateway Hotel, the "Debtors") filed a motion (the "Motion")[1] seeking approval of, among other things: (A) auction and bidding procedures (the "Bid Procedures") in connection with the sale (the

[1] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion.

"Plan Sale") of substantially all of the Debtors' assets (the "Assets"); (B) procedures to determine cure amounts and deadlines for objections with respect to certain contracts and leases proposed to be assumed and assigned by the Debtors; and (C) related relief with the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division (the "Bankruptcy Court"). The Assets consist of, among other things, the Radisson Hotel at Los Angeles International Airport (owned by Gateway Hotel) and an adjacent parcel of real estate upon which sits a partially constructed eight-story parking structure (owned by Gateway Deck). By order dated _____ _____, 2010, the Bankruptcy Court approved the Bid Procedures attached as Addendum 1 to the Bid Procedures Order [Docket No. ___] (the "Bid Procedures Order").

PLEASE TAKE FURTHER NOTICE that all interested parties are invited to submit a Qualified Bid and to make an offer to purchase the Assets in accordance with the terms of the Bid Procedures and the Bid Procedures Order. The deadline to submit bids (the "Bid Deadline") is _____, 2010 at 5:00 p.m. (prevailing Chicago Time).

PLEASE TAKE FURTHER NOTICE that, pursuant to the Bid Procedures Order, the Debtors intend to conduct an auction (the "Auction") for the sale of the Assets at the offices of Perkins Coie LLP, 131 S. Dearborn St., Ste. 1700, Chicago, IL 60603 on _____, 2010 beginning at _____ a.m. (prevailing Chicago Time), or at such other place and time as the Debtors shall notify all Qualified Bidders who have submitted Qualified Bids.

PLEASE TAKE FURTHER NOTICE that the Debtors intend to seek the Bankruptcy Court's confirmation of the Plan and approval of the Plan Sale of the Assets at a hearing (the "Confirmation Hearing"), which the Debtors have requested to be held on _____, 2010 at _____ a.m. (prevailing Chicago Time) before the Honorable Bruce W. Black or any judge sitting in his stead, in Room 615 of the Everett McKinley Dirksen Building, 219 South Dearborn Street, Chicago, Illinois 60604. The Debtors will provide separate notice of the Confirmation Hearing and related balloting and objection deadlines as formally scheduled by the Bankruptcy Court.

PLEASE TAKE FURTHER NOTICE that this Notice is subject to the complete terms and conditions of the Motion, the Bid Procedures and the Bid Procedures Order, which shall control in the event of any conflict, and the Debtors encourage parties in interest to review such documents in their entirety. Copies of these pleadings may be obtained by written request to counsel to the Debtors, c/o Perkins Coie LLP, 131 S. Dearborn St., Ste. 1700, Chicago, IL 60603, Attn: David M. Neff and Brian A. Audette. In addition, copies of the aforementioned pleadings may be found on the Bankruptcy Court's website, www.ilnb.uscourts.gov, and are on file with the Bankruptcy Court and available for inspection during regular business hours at the office of the Clerk of the Bankruptcy Court, Everett McKinley Dirksen Building, 219 South Dearborn Street, Chicago, Illinois 60604.

Dated: _____, 2010

PERKINS COIE LLP
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Counsel for the Debtors

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ORDER

November 30, 2010

BEFORE

FRANK H. EASTERBROOK, Chief Judge
KENNETH F. RIPPLE, Circuit Judge
JOHN DANIEL TINDER, Circuit Judge

Nos.: 10-3597 & 10-3598	IN RE: RIVER ROAD HOTEL PARTNERS, LLC, RIVER ROAD EXPANSION PARTNERS, LLC, et al., Debtors - Appellants
Originating Case Information:	
Bankruptcy Case Nos.: 09 B 30029 & 09-30047 Northern District of Illinois, Eastern Division Bankruptcy Judge Bruce W. Black	
No.: 10-8044	IN RE: RIVER ROAD HOTEL PARTNERS, LLC, et al., Petitioners
Originating Case Information:	
Bankruptcy Case No.: 09 B 30029 Northern District of Illinois, Eastern Division Bankruptcy Judge Bruce W. Black	
No.: 10-8045	IN RE: RADLAX GATEWAY HOTEL, LLC, et al., Petitioners

Originating Case Information:
Bankruptcy Case No.: 09-30047 Northern District of Illinois, Eastern Division Bankruptcy Judge Bruce W. Black

Appeal nos. 10-3597, 10-3598, 10-8044 & 10-8045

The following are before the court:

1. **CERTIFICATION FOR DIRECT APPEAL TO COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN *IN RE RIVER ROAD HOTEL PARTNERS, LLC***, filed on November 5, 2010, by counsel for petitioners in appeal no. 10-3597.

2. **CERTIFICATION FOR DIRECT APPEAL TO COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN *IN RE RADLAX GATEWAY HOTEL, LLC***, filed on November 5, 2010, by counsel for petitioners in appeal no. 10-3598.

The court authorizes the direct appeal from the bankruptcy court's October 5, 2010, orders denying debtors' bid procedure motions. The court consolidated appeal no. 10-3598 with appeal no. 10-3597 for briefing and disposition. Appellants shall submit one consolidated brief due on or before January 18, 2011. Appellee shall submit one responsive brief due on or before February 17, 2011. Appellants' consolidated reply brief, if any, is due on or before March 3, 2011. The clerk of this court shall close cases numbered 10-8044 and 10-8045 as unnecessary.

* * *

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Chapter 11
No. 09-30029

In re:	)
	)
RIVER ROAD HOTEL PARTNERS, LLC, et al.,	)
	)
Debtors,	)

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Chapter 11
No. 09-30047

In re:	)
	)
RADLAX GATEWAY HOTEL, LLC, et al.,	)
Debtors	)

The deposition of PETER G. DUMON, taken at 131 South Dearborn Street, Chicago, Illinois, before Janice M. Kocek, CSR, CLR, License No. 084-002871, Notary Public within and for the County of Cook, State of Illinois, and a Certified Shorthand Reporter within and for the State of Illinois, commencing at the hour of 9:44 a.m. on Thursday, December 2, 2010.

[page 3]

* * *

Q. What is your authority in a general way with respect to the debtors?

A. Generally speaking, I have authority to manage the debtors in both cases.

Q. And you get to make the final decisions essentially, correct?

A. Right.

* * *

[page 13]

Q. If you have the opportunity today to try to market the property again, the properties, would you insist on a bid higher than the Och-Ziff bids in the plan for the two sets of assets, the River Road and the RadLAX assets?

MR. AUDETTE: I'll object to the extent it calls for speculation.

THE WITNESS: I believe we've already done so. I think we've made, you know, our intention clear that we believe that they're worth substantially, you know, [page 14] in the case of the InterCon, you know, probably over two-thirds higher than our stalking-horse bid.

And, you know, in the case of the Radisson, again, substantially higher than the

stalking-horse bid that was formulated, you know, in the early part of '10.

And you know, I think it would be our intention to, you know, increase that floor price because we wouldn't want to waste anyone's time or deceive the public that, you know, we thought that $42 million in the case of the InterCon and 47 in the case of the Radisson was ultimately going to be disposition price. We, you know, increased that floor price, and again, make that subject to higher and better bids

BY MR. LEWIS:

Q. So you would not -- you would not propose the plan that you proposed last June and sort of reproposed in August with the same stalking-horse bid price; is that right?

A. That's correct.

* * *

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

09-B 30047
Chicago, Illinois
1:30 p.m.
January 27, 2011

RADLAX/Gateway Hotel, LLC, INC., et al.	)
	)
Debtors,	)
	)

TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE BRUCE W. BLACK

APPEARANCES:

For Debtors:	Mr. David Neff;
For U.S. Bank:	Mr. Adam Lewis; Mr. Forrest Lammiman;
For Amalgamated Bank:	Mr. Adam Lewis;
For Och-Ziff:	Ms. Leslie Bayles
For Bomel Construction:	Ms. Lauren Newman;

* * *

[page 5]

* * *

MR. LEWIS: Thank you, YourHonor.

* * *

[page 6]

* * *

. . . . But we don't have anything. We don't have a plan because, as Mr. Dumon's testimony that we quoted reflects, the plan that was filed last spring is no longer the plan.

There is no plan in front of this Court, and not just because of the Court's ruling, but because the values in that plan, the stalking horse values, are not even close to being market. And Mr. Dumon himself has [page 7] testified that he would require far more in order to proceed with any sort of plan.

Next, we have no evidence, no evidence, that there's anything like someone out there who's going to sponsor a plan. We have Mr. Franzen's hearsay testimony, and evidently, we have someone in court today from Och-Ziff who's a lawyer who's going to say something on behalf of Och-Ziff, but we don't have any evidence.

We don't have any sworn testimony saying, yeah, we're ready to come back in here at 50 million or 70 million or whatever, and yet, we're five months since the Court made its ruling on the existing plan,

and yet, there's nothing, no new plan. And even then, Your Honor, under the old plan, we didn't have a signed agreement.

* * *

[page 8]

There's no evidence that either Och-Ziff or anyone else is out there ready to fund a plan. All we have is the debtors' word for it and nothing more. And so there is no evidence suggesting that the debtors' plan in the form that it was presented to the Court is anywhere close to being ready to be teed up or it would have been.

* * *

[page 12]

MR. NEFF:

* * *

The question before the Court is whether there's a reasonable possibility of an effective reorganization within a reasonable time. We addressed this all in our response, Judge, as you've seen and from what you've read.

And I would note the lender fails to address most of our response in its reply. Instead, what it focuses on is by telling Your Honor that there's no plan before the Court, there's no stalking horse, and no internal plan of reorganization here.

And basically, it – what the lender does is rehashes the same arguments they made to Your Honor when they filed the response and objection to our motion to certify the appeal to the Seventh Circuit which Your Honor denied and went ahead and certified that appeal, which, as Your Honor knows, the Seventh Circuit almost immediately accepted. This is nothing more than a [page 13] blatant attempt by the lender to moot that appeal when combined with what the lender has filed in the River Road cases, although I note in that particular case, Your Honor, although the lender has filed a plan and disclosure statement, an amended plan and amended disclosure statement, they still have not filed any motions to set a hearing on the adequacy of the disclosure statement, and I don't know if they're waiting to see what Your Honor does this afternoon as to determine what course they're going to take in that case as well.

* * *

[page 17]

And I also think it's inaccurate to say we don't have a plan on file. We have a very detailed plan and a very detailed disclosure statement on file. And as Mr. Lewis well knows, per Mr. Dumon's testimony, the only thing that's going to change is the stalking horse bid is going to go up.

With regard to Och-Ziff, Your Honor, they are here in court represented by counsel. They've been here a number of times. They remain committed to being the stalking horse, and Mr. Franzen so related in his affidavit.

* * *

[page 22]

* * *

MR. LEWIS: May I, Your Honor?

* * *

[page 24]

* * *

Once again, we have not had anybody come in here and say under oath, [page 25] there's no declarations, that we're ready to raise our price, or we're ready to fund the plan.

* * *

So where we are is, to emphasize [page 26] once again, there's no plan on file because the plan that has numbers in it right now is not the plan anymore.

[page 30]

MS. BAYLES: Your Honor, the reason I'm in court today has been anticipated obviously by Mr. Neff and Mr. Lewis. Och-Ziff remains engaged in this process. They remain interested in purchasing these properties.

I'm not here to give testimony about, you know, where the parties are at on valuation. I know it's a focus for the parties right now, but to the extent it's relevant to the Court's consideration, Och-Ziff is very interested in continuing in the process and certainly

has not backed away from being a stalking horse in this case.

THE COURT: Thank you.

MR. NEFF: Just the last point, to address Mr. Lammiman, we have a very [page 31] detailed plan and disclosure statement on file. All that's going to change is the stalking horse price.

* * *

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Case No. 09-30047
Chapter 11
(Jointly Administered)

Hon. Bruce W. Black

[Filed February 15, 2011]

In re:	)
	)
RADLAX GATEWAY HOTEL, LLC, et al.,	)
	)
Debtors.	)
	)

DEBTORS' SECOND AMENDED JOINT CHAPTER 11 PLAN

RadLAX Gateway Hotel, LLC and RadLAX Gateway Deck, LLC hereby submit their Second Amended Joint Chapter 11 Plan.

Dated: February 15, 2011

By: /s/ Brian A. Audette
PERKINS COIE LLP
David M. Neff (ARDC # 6190202)
Brian A. Audette (ARDC # 6277056)
Eric E. Walker (ARDC # 6290993)
131 S. Dearborn Street - Suite 1700
Chicago, Illinois 60603-5559
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Counsel to the Debtors

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INTRODUCTION

This second amended joint chapter 11 plan (as amended or modified hereafter in accordance with its terms, the "Plan"), dated as of February 15, 2011, is proposed by RadLAX Gateway Hotel, LLC ("Gateway Hotel") and RadLAX Gateway Deck, LLC ("Gateway Deck" and together with Gateway Hotel, the "Debtors"). Reference is made to the Disclosure Statement accompanying the Plan for a discussion of the Debtors' history, business, results of operations, historical financial information, properties, projections for future operations and risk factors, a summary and analysis of the Plan, and certain related matters. The Debtors are proponents of the Plan within the meaning of section 1129 of the Bankruptcy Code.

ALL CREDITORS OF THE DEBTORS ARE ENCOURAGED TO READ THE PLAN AND THE DISCLOSURE STATEMENT IN THEIR ENTIRETY BEFORE VOTING TO ACCEPT OR REJECT THE PLAN. SUBJECT TO CERTAIN RESTRICTIONS AND REQUIREMENTS SET FORTH IN SECTION 1127 OF THE BANKRUPTCY CODE, BANKRUPTCY RULE 3019 AND THE PLAN, THE DEBTORS RESERVE THE RIGHT TO ALTER, AMEND, MODIFY, REVOKE OR WITHDRAW THE PLAN PRIOR TO ITS SUBSTANTIAL CONSUMMATION.

Capitalized terms used herein shall have the meanings set forth in Article I hereof. The Debtors have obtained Bankruptcy Court authority to have the Chapter 11 Cases jointly administered for administrative and procedural purposes. In addition, the Plan is premised upon the substantive consolidation of the Debtors. Claims against, and

Interests in, the Debtors (other than Administrative Claims and Priority Tax Claims) are classified in Article II hereof and treated in Article III hereof.

ARTICLE I
DEFINITIONS, INTERPRETATION AND EXHIBITS

Definitions. Unless the context requires otherwise, the following terms shall have the following meanings whether presented in the Plan or the Disclosure Statement with initial capital letters or otherwise. As used herein:

"Administrative Claim" means a Claim for: (a) any cost or expense of administration (including, without limitation, the fees and expenses of Professionals) of any of the Chapter 11 Cases asserted or arising under sections 503, 507(a)(1), 507(b) or 1114(e)(2) of the Bankruptcy Code including, but not limited to (i) any actual and necessary post Petition Date cost or expense of preserving the Debtors' respective Estates or operating the businesses of the Debtors, (ii) any post Petition Date cost, indebtedness or contractual obligation duly and validly incurred or assumed by the Debtors in the ordinary course of their business, (iii) compensation or reimbursement of expenses of Professionals to the extent Allowed by the Bankruptcy Court under sections 330(a) or 331 of the Bankruptcy Code, and (iv) all Allowed Claims that are entitled to be treated as Administrative Claims pursuant to a Final Order of the Bankruptcy Court under section 546 of the Bankruptcy Code; and (b) any fees or charges assessed against the Debtors' respective Estates under section 1930 of title 28 of the United States Code.

"Affiliate" shall have the meaning set forth in section 101(2) of the Bankruptcy Code.

"Allowed" means, with reference to any Claim, (a) any Claim against either of the Debtors that has been listed by the Debtors in their Schedules, as such Schedules may have been amended by the Debtors from time to time in accordance with Bankruptcy Rule 1009, as liquidated in amount and not disputed or contingent, and with respect to which no contrary proof of claim has been filed, (b) any Claim specifically allowed under the Plan, (c) any Claim the amount or existence of which has been determined or allowed by a Final Order, or (d) any Claim as to which a proof of claim has been timely filed before the Bar Date, provided that at the time of the Effective Date the Debtors have not identified such Claim as being objectionable in part or in whole and no objection to the allowance thereof has been filed by the Claims Objection Deadline; provided, however, that the term Allowed, with reference to any Claim, shall not include (x) any unliquidated claim or (y) interest or attorneys' fees on or related to any Claim that accrues from and after the Petition Date unless otherwise expressly provided for in the Plan; provided, further, that the term Allowed, with reference to any Bonded Stop Notice Mechanic's Lien Claim shall mean any Bonded Stop Notice Mechanic's Lien Claim that is liquidated by one or more Final Orders of any court of competent jurisdiction.

"Allowed Claim" means a Claim that is Allowed.

"Allowed Interest" means an Interest that is Allowed.

"Asset Purchase Agreement" means that certain Asset Purchase Agreement dated as of February 15, 2011 by and among the Debtors, as sellers, and the Stalking Horse Bidder, as buyer, which provides for the sale of certain or substantially all of the Debtors' assets, or such other asset purchase agreement submitted at or prior to the Auction and subsequently determined by the Debtors pursuant to the Sale and Bid Procedures to be the highest or otherwise best offer for such assets.

"Auction" means the auction for the sale of the Debtors' assets to be held in accordance with the Sale and Bid Procedures.

"Avoidance Actions" means any and all Causes of Action which a trustee, debtor in possession, the Estates or other appropriate party in interest may assert under sections 502, 510, 541, 542, 543, 544, 545, 547, 548, 549, 550, 551, or 553 of the Bankruptcy Code (other than those which may be released or dismissed as part of and pursuant to the Plan) or under other similar or related state or federal statutes or common law, including fraudulent conveyance laws.

"Ballot" means the forms of ballots accompanying the Disclosure Statement upon which Holders of Impaired Claims and Interests entitled to vote on the Plan shall, among other things, indicate their acceptance or rejection of the Plan in accordance with the instructions regarding voting.

"Bankruptcy Code" means the Bankruptcy Reform Act of 1978, as codified in title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.*, as in effect on the Petition Date, together with all amendments and

modifications thereto that subsequently may be made applicable to the Chapter 11 Cases.

"Bankruptcy Court" means the United States Bankruptcy Court for the Northern District of Illinois or, if such court ceases to exercise jurisdiction over these proceedings, the court or adjunct thereof that exercises jurisdiction over the Chapter 11 Cases.

"Bankruptcy Rules" means: (a) the Federal Rules of Bankruptcy Procedure and the Official Bankruptcy Forms, as amended and promulgated under section 2075 of title 28 of the United States Code; (b) the Federal Rules of Civil Procedure, as amended and promulgated under section 2072 of title 28 of the United States Code; (c) any local rules applicable to the Bankruptcy Court; and (d) any standing orders governing practice and procedure issued by the Bankruptcy Court, each as in effect on the Petition Date, together with all amendments and modifications thereto that were subsequently made applicable to the Chapter 11 Cases or proceedings therein, as the case may be.

"Bar Date" means the applicable bar date by which a proof of Claim must be, or must have been, Filed, as established by an order of the Bankruptcy Court.

"Bonded Stop Notice Mechanic's Lien Claims" means bonded stop notice claims asserted against the Lender pursuant to section 3172 of the California Civil Code by mechanic's lien claimants related to liens asserted against the Real Property.

"Bonded Stop Notice Mechanic's Lien Litigation" means the consolidated litigation pending in the

California State Court under Case No. YC059821, which has been consolidated with Case Nos. YC060350, YC060436, YC060475, YC060152, YC060930, YC060903, YC060308, 09C02806, 09C03782, YC060351, YC060247, 09C02887, and BC417678, in which the Bonded Stop Notice Mechanic's Lien Claims are pending.

"Business Day" means any day which is not a Saturday, a Sunday, a "legal holiday" as defined in Bankruptcy Rule 9006(a), or a day on which banking institutions in the State of Illinois are authorized or obligated by law, executive order or governmental decree to be closed.

"California State Court" means the Superior Court for the State of California, County of Los Angeles.

"Cash" means money, currency and coins, negotiable checks, balances in bank accounts and other lawful currency of the United States of America and its equivalents.

"Causes of Action" means any and all actions, claims, rights, defenses, third-party claims, damages, executions, demands, crossclaims, counterclaims, suits, choses in action, controversies, agreements, promises, rights to legal remedies, rights to equitable remedies, rights to payment and claims whatsoever, whether known, unknown, reduced to judgment, not reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured and whether asserted or assertable directly, indirectly or derivatively, at law, in equity or otherwise, accruing to

the Debtors, including, but not limited to, the Avoidance Actions.

"Chapter 11 Cases" means the cases under chapter 11 of the Bankruptcy Code commenced by the Debtors in the Bankruptcy Court on the Petition Date.

"Claim" shall have the meaning set forth in section 101(5) of the Bankruptcy Code.

"Claims Objection Deadline" means the latest of: (a) 75 Days after the Effective Date; (b) 75 Days after the date on which any Claim is Filed; or (c) such other date as may be fixed by the Bankruptcy Court, whether fixed before or after the date specified in clauses (a) and (b) above.

"Class" means each class, subclass or category of Claims or Interests as classified in Article II of the Plan.

"Confirmation" or "Confirmed" means the entry by the Bankruptcy Court of the Confirmation Order.

"Confirmation Date" means the date on which the Clerk of the Bankruptcy Court enters the Confirmation Order on the docket of the Bankruptcy Court with respect to the Chapter 11 Cases within the meaning of Bankruptcy Rules 5003 and 9021.

"Confirmation Hearing" means the hearing held before the Bankruptcy Court to consider Confirmation of the Plan pursuant to sections 1128 and 1129 of the Bankruptcy Code.

"Confirmation Order" means the order entered by the Bankruptcy Court confirming the Plan pursuant to section 1129 of the Bankruptcy Code.

"Creditor" means any Person that is the Holder of any Claim against any of the Debtors.

"Creditor Profit Sharing Income" means a total of $750,000 to be paid in Cash by the Purchaser to the Liquidation Trustee, of which $150,000 shall be made within sixty (60) Days following the expiration of the first Operating Year, $300,000 shall be made within sixty (60) Days following the expiration of the second Operating Year, and $300,000 shall be made within sixty (60) Days following the expiration of the third Operating Year.

"Day(s)" means, unless expressly otherwise provided, calendar day(s).

"Debtors" shall have the meaning set forth in the Introduction.

"Deck" means that parcel of real estate adjacent to the Hotel upon which sits a partially constructed parking structure.

"Disallowed" means, with respect to any Claim or Interest or portion thereof, any Claim against or Interest in the Debtors which: (a) has been withdrawn, in whole or in part, by agreement of the Debtors or the Liquidation Trustee, as applicable, and the Holder thereof; (b) has been withdrawn, in whole or in part, by the Holder thereof; or (c) has been disallowed, in whole or part, by Final Order of the Bankruptcy Court or other court of competent

jurisdiction. In each case a Disallowed Claim or a Disallowed Interest is disallowed only to the extent of disallowance or withdrawal.

"Disallowed Claim" means a Claim, or any portion thereof, that is Disallowed.

"Disallowed Interest" means an Interest, or any portion thereof, that is Disallowed.

"Disclosure Statement" means the Debtors' Disclosure Statement With Respect to the Joint Chapter 11 Plan, including all exhibits, appendices, schedules and annexes, if any, attached thereto, as submitted by the Debtors, as the same may be altered, amended, supplemented or modified from time to time, and which was prepared and distributed in accordance with sections 1125 and 1126(b) of the Bankruptcy Code and Bankruptcy Rule 3018.

"Disputed" means any Claim or Interest that has been neither Allowed nor Disallowed.

"Disputed Claim" means a Claim, or any portion thereof, that is Disputed. For purposes of the Plan, a Claim that has been neither Allowed nor Disallowed shall be considered a Disputed Claim.

"Disputed Interest" means an Interest, or any portion thereof, that is Disputed. For purposes of the Plan, an Interest that has been neither Allowed nor Disallowed shall be considered a Disputed Interest.

"Effective Date" means the first Business Day following the date on which all conditions to consummation set forth in Article IX of the Plan have

been satisfied or waived (if capable of being duly and expressly waived), provided that no stay of the Confirmation Order is then in effect.

"Effective Date Cash" means all of the Debtors' cash on hand as of the Effective Date, including, without limitation, the Cash in the Real Estate Tax Escrow Reserve.

"Entity" means any individual, corporation, limited or general partnership, joint venture, association, joint stock company, limited liability company, estate, trustee, United States Trustee, unincorporated organization, government, governmental unit (as defined in the Bankruptcy Code), agency or political subdivision thereof.

"Estates" means the estates created in the Chapter 11 Cases pursuant to section 541 of the Bankruptcy Code upon commencement of the Chapter 11 Cases.

"Exculpated Persons" means: (a) directors, officers and employees of the Debtors, as of the Petition Date but prior to the Effective Date, and the Debtors' agents and professionals; (b) the Lender (if Classes 3 and 7 vote to accept the Plan); (c) the Purchaser; (d) the Liquidation Trustee; and (e) to the extent such individuals are acting in such capacity, the respective current and former officers, directors, employees, agents, stockholders, managers, members, affiliates, partners, attorneys, advisors and professionals of the parties identified in subclauses (a) through (e).

"FBR" means FBR Capital Markets & Co., the Debtors' financial advisor and investment banker retained by the Debtors pursuant to a Bankruptcy

Court order entered in the Chapter 11 Cases on September 21, 2009.

"File, Filed or Filing" means file, filed or filing with the Bankruptcy Court in the Chapter 11 Cases.

"Final Decree" means the final decree entered by the Bankruptcy Court after the Effective Date and pursuant to section 350(a) of the Bankruptcy Code and Bankruptcy Rule 3022.

"Final Order" means an order or judgment of the Bankruptcy Court, or other court of competent jurisdiction, as entered on the docket of such court, the operation or effect of which has not been stayed, reversed, vacated, modified or amended, and as to which order or judgment (or any revision, modification, or amendment thereof) of the time to appeal, petition for certiorari, or seek review or rehearing has expired and as to which no appeal, petition for certiorari, or petition for review or rehearing was filed or, if filed, remains pending; provided, however, that the possibility that a motion may be filed pursuant to Rules 9023 or 9024 of the Bankruptcy Rules or Rules 59 or 60(b) of the Federal Rules of Civil Procedure shall not mean that an order or judgment is not a Final Order.

"General Unsecured Claims" means all Claims that are not Administrative Claims, Priority Tax Claims, Professional Fee Claims, Miscellaneous Secured Claims, Miscellaneous Priority Claims, the Lender Claim, the Bonded Stop Notice Mechanic's Lien Claims, the Los Angeles County Tax Collector Claim, Lender Deficiency Claims or Insider Claims.

"Holder" means an Entity holding a beneficial interest in a Claim or Interest and, when used in conjunction with a Class or type of Claim or Interest, means a holder of a beneficial interest in a Claim or Interest in such Class or of such type.

"Hotel" means the Radisson Hotel at Los Angeles International Airport, located at 6225 W. Century Blvd., Los Angeles, California.

"Impaired" means, when used with reference to a Claim or Interest, a Claim or Interest that is impaired within the meaning of section 1124 of the Bankruptcy Code.

"Impaired Claim" means a Claim which is Impaired.

"Impaired Interest" means an Interest which is Impaired.

"Insider" shall have the meaning set forth in section 101(31) of the Bankruptcy Code.

"Insider Claims" means any Claim of an Insider against any of the Debtors, other than any Claim of an Insider that is a Claim for indemnification under the Debtors' organizational documents, employment agreements, internal policies or otherwise.

"Insurance Costs" means insurance premiums relating to liability and casualty coverage and business interruption insurance policies maintained with respect to the Hotel.

"Interests" means any and all equity interests, ownership interests or shares in the Debtors issued by the Debtors prior to the Petition Date whether or not certificated, transferable, voting or denominated "stock" or a similar security, and any Claim or Cause of Action related to or arising from any of the foregoing.

"Lender" means Amalgamated Bank, as Trustee of the Longview Ultra Construction Loan Investment Fund, in its capacity as administrative agent for itself and San Diego National Bank.

"Lender Deficiency Claim" means the Claim of the Lender, but only to the extent that such Claim is an Unsecured Claim as determined by 11 U.S.C. § 506(a)(1).

"Lender Secured Claim" means the Claim of the Lender, but only to the extent that such Claim is a secured claim as determined by section 506(a)(1) of the Bankruptcy Code.

"Liens" means, with respect to any asset or Property (or the rents, revenues, income, profits or proceeds therefrom), and in each case, whether the same is consensual or nonconsensual or arises by contract, operation of law, legal process or otherwise: (a) any and all mortgages, liens, pledges, attachments, charges, leases evidencing a capitalizable lease obligation, conditional sale or other title retention agreement, or other security interest or encumbrance or other legally cognizable security devices of any kind in respect of any asset or Property, or upon the rents, revenues, income, profits or proceeds therefrom; or (b) any arrangement, express or implied, under which

any Property is transferred, sequestered or otherwise identified for the purpose of subjecting or making available the same for the payment of debt or performance of any other obligation in priority to the payment of general unsecured Creditors.

"Liquidating Trust" means the trust to be established in accordance with Section 7.03 of the Plan.

"Liquidating Trust Agreement" means the agreement to be executed between the Liquidation Trustee and the Debtors establishing the Liquidating Trust, which will be filed with the Plan Supplement. "Liquidating Trust Documents" means the Liquidating Trust Agreement and any ancillary documents relating thereto.

"Liquidation Trustee" means the trustee of the Liquidating Trust.

"Los Angeles County Tax Collector Claim" means the principal amount of the Secured Claim of the Los Angeles County Tax Collector for real estate taxes relating to the Real Property for any period prior to the Petition Date through and including the Effective Date, without interest, fees, or other applicable charges or costs.

"Miscellaneous Priority Claims" means any Claim against the Debtors entitled to priority pursuant to section 507(a) of the Bankruptcy Code, other than a Priority Tax Claim or an Administrative Claim.

"Miscellaneous Secured Claims" means any Secured Claim other than the Lender Secured Claim and the Los Angeles County Tax Collector Claim.

"Objection" means any objection, application, motion, complaint or any other legal proceeding seeking, in whole or in part, to disallow, determine, liquidate, classify, reclassify or establish the priority, expunge, subordinate or estimate any Claim (including the resolution of any request for payment of any Administrative Claim) or Interest other than a Claim or an Interest that is Allowed.

"Operating Year" means each twelve-month period commencing on the Effective Date (or anniversary of the Effective Date, as the case may be) and ending on the day immediately preceding the anniversary of the Effective Date.

"Person" means and includes a natural person, individual, partnership, corporation (as defined in section 101(a) of the Bankruptcy Code), or organization including, without limitation, corporations, limited partnerships, limited liability companies, general partnerships, joint ventures, joint stock companies, trusts, land trusts, business trusts, unincorporated organizations or associations, or other organizations, irrespective of whether they are legal entities, governmental bodies (or any agency, instrumentality or political subdivision thereof), or any other form of legal entities; provided, however, "Person" does not include governmental units, except that a governmental unit that (a) acquires an asset from a Person (i) as a result of the operation of a loan guarantee agreement or (ii) as receiver or liquidating agent of a Person; (b) is a guarantor of a pension

benefit payable by or on behalf of a Debtor or an Affiliate of a Debtor; or (c) is the legal or beneficial owner of an asset of (i) an employee pension benefit plan that is a governmental plan, as defined in section 414(d) of the Internal Revenue Code of 1986 or (ii) an eligible deferred compensation plan, as defined in section 457(b) of the Internal Revenue Code of 1986, shall be considered for purposes of section 1102 of the Bankruptcy Code to be a Person with respect to such asset or such benefit.

"Petition Date" means August 17, 2009, the date on which the Debtors Filed their respective petitions for relief commencing the Chapter 11 Cases.

"Plan" means this Second Amended Joint Chapter 11 Plan dated as of February 15, 2011, including all exhibits, appendices, schedules and annexes, if any, attached hereto, as submitted by the Debtors, including the Plan Supplement, as such Plan may be altered, amended, supplemented or modified from time to time in accordance with the provisions of the Bankruptcy Code, the Bankruptcy Rules, the Confirmation Order and the terms and conditions of Section 12.04 of the Plan.

"Plan Supplement" means the supplement to this Plan to be Filed with the Bankruptcy Court on or before the date that is five (5) Days prior to the Confirmation Hearing.

"Priority Tax Claim" means any and all Claims accorded priority in payment pursuant to section 507(a)(8) of the Bankruptcy Code. For clarity, the Los Angeles County Tax Collector Claim is not a Priority Tax Claim.

"Pro Rata Share" means, with respect to any Claim, a proportionate share, so that the ratio of the consideration distributed on account of an Allowed Claim in a Class to the consideration distributed on account of all Allowed Claims in that Class is the same as the ratio such Claim bears to the total amount of all Allowed Claims in that Class (plus Disputed Claims in that Class until disallowed).

"Professional Fee Claim" means a claim for compensation and/or reimbursement of expenses pursuant to sections 327, 328, 330, 331, 503(b) or 506(c) of the Bankruptcy Code relating to services incurred on and after the Petition Date and prior to and including the Effective Date in connection with an application made to the Bankruptcy Court by Professionals in the Chapter 11 Cases; provided, however, that in the case of the Debtors' primary bankruptcy counsel, Perkins Coie LLP, Professional Fee Claim shall include certain fees and expenses incurred prior to the Petition Date.

"Professionals" means any professional employed in these Chapter 11 Cases pursuant to sections 327 or 1103 of the Bankruptcy Code or any Professional entitled to compensation pursuant to sections 327, 328, 330, 331, 503(b)(2) or (4), 506(c) or 1103 of the Bankruptcy Code.

"Property" means all assets or property of the Debtors' respective Estates of any nature whatsoever, real or personal, tangible or intangible, including contract rights, accounts and Causes of Action, previously or now owned by the Debtors, or acquired by the Debtors' respective Estates, as defined in section 541 of the Bankruptcy Code.

"Purchaser" means the purchaser under the Asset Purchase Agreement.

"Real Estate Tax Escrow Reserve" means the Cash escrow reserve the Debtors established for the payment of the Los Angeles County Tax Collector Claim.

"Real Property" means, collectively, the Hotel and the Deck.

"Reinstated or Reinstatement" means: (a) leaving unaltered the legal, equitable, and contractual rights to which a Claim entitles the Holder of such Claim so as to leave such Claim Unimpaired in accordance with section 1124 of the Bankruptcy Code; or (b) notwithstanding any contractual provision or applicable law that entitles the Holder of such Claim to demand or receive accelerated payment of such Claim after the occurrence of a default (i) curing any such default that occurred before or after the Petition Date, other than a default of a kind specified in section 365(b)(2) of the Bankruptcy Code; (ii) reinstating the maturity of such Claim as such maturity existed before such default; (iii) compensating the Holder of such Claim for any damages incurred as a result of any reasonable reliance by such Holder on such contractual provision or such applicable law; and (iv) not otherwise altering the legal, equitable, or contractual rights to which such Claim entitled the Holder of such Claim; provided, however, that any contractual right that does not pertain to the payment when due of principal and interest on the obligation on which such Claim is based, including, but not limited to, financial covenant ratios, negative pledge covenants, covenants or restrictions on merger or consolidation, and

affirmative covenants regarding corporate existence or which prohibit certain transactions or actions contemplated by the Plan, or conditioning such transactions or action on certain factors, shall not be required to be reinstated in order to accomplish Reinstatement.

"Rejection Claims" means claims of any non-Debtor counterparty to any unexpired leased of nonresidential real property or any executory contract arising on account of the rejection of such lease or contract during the administration of these Chapter 11 Cases under section 365 of the Bankruptcy Code or pursuant to the Plan or the Asset Purchase Agreement.

"Releasees" means: (a) the directors, members, managers, officers and employees of the Debtors, in each case as of the Petition Date or that have become directors, members, managers, officers, or employees thereafter but prior to the Effective Date, and the Debtors' agents and professionals, (b) the Lender (if Classes 3 and 7 vote to accept the Plan), (c) the Purchaser, (d) the Liquidation Trustee, and (e) to the extent such parties are deemed Releasees, the respective current and former officers, directors, employees, agents, stockholders, managers, members, affiliates, partners, advisors and professionals of the parties identified in subclauses (a) through (e); provided, however, that the foregoing released parties identified in subclauses (a) through (e) above shall be released only from liabilities arising out of actions taken in such capacity.

"Sale" means the sale of certain or substantially all of the Debtors' assets under or in connection with the Plan and the Asset Purchase Agreement.

. "Sale and Bid Procedures" means the sale, bid and auction procedures set forth and described in the Sale and Bid Procedures Motion.

"Sale and Bid Procedures Motion" means the Debtors' Motion for an Order: (A) approving procedures for the sale of substantially all of the Debtors' assets; (B) scheduling an auction; (C) approving assumption and assignment procedures; (D) approving form of notice; and (E) granting related relief, Filed by the Debtors in the Chapter 11 Cases on June 4, 2010.

"Sale Documents" means the Asset Purchase Agreement, the Schedule of Assumed Contracts, and any schedules, exhibits or other documents attached thereto or contemplated thereby, in each case as amended from time to time in accordance with their terms. The Disclosure Statement will include a form of the Sale Documents of the Stalking Horse Bidder in substantially the form to be implemented on the Effective Date.

"Sale Proceeds" means $55,000,000 to be paid by the Purchaser to or for the benefit of the Debtors' estates pursuant to the Asset Purchase Agreement, plus any additional sums to be paid by the Purchaser pursuant to the Asset Purchase Agreement, by adjustment or otherwise, minus any sums to be credited to the Purchaser pursuant to the Asset Purchase Agreement, by adjustment or otherwise.

"Schedule of Assumed Contracts" means the schedule listing certain executory contracts and unexpired leases to be assumed by the Debtors and assigned to the Purchaser under or in connection with

the Asset Purchase Agreement, which schedule shall be set forth in or as an attachment or exhibit to the Asset Purchase Agreement.

"Schedules" means the schedules of assets and liabilities and statements of financial affairs Filed by the Debtors in the Chapter 11 Cases, as required by section 521 of the Bankruptcy Code, as the same may have been or may be amended, modified or supplemented.

"Secured Claim" means any Claim arising before the Petition Date that is: (a) secured in whole or part, as of the Petition Date, by a Lien which is valid, perfected and enforceable under applicable law on Property in which the Debtors' respective Estates has an interest and is not subject to avoidance under the Bankruptcy Code or applicable non-bankruptcy law; or (b) subject to setoff under section 553 of the Bankruptcy Code, but, with respect to both case (a) and (b), only to the extent of the value of the assets or Property securing any such Claim or the amount subject to setoff, as the case may be.

"Stalking Horse Bidder" means LAXCSH LLC, a Delaware limited liability company, an entity wholly owned by Och-Ziff Real Estate Acquisitions LP.

"Tax" means any tax, charge, fee, levy, impost or other assessment by any federal, state, local or foreign governmental authority, including, without limitation, income, excise, property, sales, transfer, employment, payroll, franchise, profits, license, use, ad valorem, estimated, severance, stamp, occupation and withholding tax, together with any interest, penalties, fines or additions attributable to, imposed on, or

collected by any such federal, state, local or foreign governmental authority.

"Unclaimed Property" means any distribution of Cash or any other Property made to the Holder of an Allowed Claim pursuant to the Plan that is returned to the Debtors or the Liquidation Trustee as undeliverable and no appropriate forwarding address is received prior to the date on which the Final Decree is entered in the Chapter 11 Cases, in the case of a distribution made in the form of a check, is not negotiated and no request for reissuance is made as provided for in Section 5.06 of the Plan.

"Uniform System" means the latest edition of the Uniform System of Accounts for the Lodging Industry that is published by the Hotel Association of New York City, Inc. and approved by the American Hotel & Motel Association.

"Unimpaired" means any Claim that is not Impaired within the meaning of section 1124 of the Bankruptcy Code.

"United States Trustee" means the United States Trustee appointed under section 581(a)(3) of title 28 of the United States Code to serve in the Northern District of Illinois.

"U.S. Trustee's Fee Claims" means any fees assessed against the Debtors' Estates pursuant to section 1930(a)(6) of title 28 of the United States Code.

Section 1.02. Rules of Interpretation. All references to "the Plan" herein shall be construed, where applicable, to include references to this

document and all its exhibits, appendices, schedules and annexes, if any (and any amendments thereto made in accordance with the Bankruptcy Code). Whenever from the context it appears appropriate, each term stated in either the singular or the plural shall include the singular and the plural, and pronouns stated in the masculine, feminine or neuter gender shall include the masculine, feminine and the neuter. The words "herein," "hereof," "hereto," "hereunder," and other words of similar import refer to the Plan as a whole and not to any particular paragraph, subparagraph, or clause contained in the Plan. The words "includes" and "including" are not limiting and mean that the things specifically identified are set forth for purposes of illustration, clarity or specificity and do not in any respect qualify, characterize or limit the generality of the class within which such things are included. The captions and headings in the Plan are for convenience of reference only and shall not limit or otherwise affect the provisions hereof. Any term used in the Plan that is not defined in the Plan, either in Article I hereof or elsewhere, but that is used in the Bankruptcy Code or the Bankruptcy Rules shall have the meaning assigned to that term in (and shall be construed in accordance with the rules of construction under) the Bankruptcy Code or the Bankruptcy Rules (with the Bankruptcy Code controlling in the case of a conflict or ambiguity). Without limiting the preceding sentence, the rules of construction set forth in section 102 of the Bankruptcy Code shall apply to the Plan, unless superseded herein. In computing any period of time prescribed or allowed by the Plan, the provisions of Bankruptcy Rule 9006(a) and Section 13.18 hereof shall apply, but Bankruptcy Rule 9006(a) shall govern.

Section 1.03. Exhibits. Any Exhibits to the Plan, including the Plan Supplement, are incorporated into and are a part of the Plan as if set forth in full herein, regardless of when Filed.

ARTICLE II
CLASSIFICATION OF CLAIMS AND INTERESTS

Section 2.01. Generally. Pursuant to section 1122 of the Bankruptcy Code, set forth below is a designation of Classes of Claims and Interests. A Claim or an Interest is classified in a particular Class only to the extent that the Claim or Interest qualifies within the description of the Class and is classified in a different Class to the extent the Claim or Interest qualifies within the description of that different Class. A Claim or Interest is placed in a particular Class for the purpose of receiving distributions pursuant to the Plan only to the extent that such Claim or Interest is an Allowed Claim or an Allowed Interest in that Class and such Claim or Interest has not been paid, released, settled or otherwise satisfied prior to the Effective Date.

Section 2.02. Unclassified Claims. In accordance with section 1123(a)(1) of the Bankruptcy Code, Administrative Claims and Priority Tax Claims are not classified and are excluded from the Classes designated in this Article II of the Plan. The treatment accorded Administrative Claims and Priority Tax Claims is set forth in Article III of the Plan.

Section 2.03. Unimpaired Classes. The Plan classifies the following Unimpaired Claims that are

not entitled to vote on the Plan. Pursuant to section 1126(f) of the Bankruptcy Code, each Holder of a Claim in the following Classes is conclusively presumed to have accepted the Plan in respect of such Claims and is not entitled to vote to accept or reject the Plan:

> Class 1 shall consist of all Miscellaneous Secured Claims.
>
> Class 2 shall consist of all Miscellaneous Priority Claims.

Section 2.04. Impaired Classes Entitled to Vote. The Plan classifies the following Classes as the only Impaired Classes that may receive a distribution under the Plan and that are entitled to vote to accept or reject the Plan:

> Class 3 shall consist of the Lender Secured Claim.
>
> Class 4 shall consist of the Bonded Stop Notice Mechanic's Lien Claims.
>
> Class 5 shall consist of the Los Angeles County Tax Collector Claim.
>
> Class 6 shall consist of the General Unsecured Claims.
>
> Class 7 shall consist of the Lender Deficiency Claim.

Section 2.05. Impaired Classes Deemed to Reject. The Plan classifies the following Impaired Classes of

Interests and Claims as Impaired Classes that are not entitled to vote to accept or reject the Plan. Pursuant to section 1126(g) of the Bankruptcy Code, each Holder of an Interest or Claim in these Classes is conclusively presumed to have rejected the Plan in respect of such Interests or Claims because the Plan does not entitle the Holders of such Interests and Claims to receive or retain any property under the Plan on account of such Interests or Claims. Accordingly, Holders of such Interests and Claims are not entitled to vote to accept or reject the Plan:

> Class 8 shall consist of all Interests in the Debtors.
>
> Class 9 shall consist of all Insider Claims.

ARTICLE III
PROVISIONS FOR TREATMENT OF CLASSES OF CLAIMS AND INTERESTS

Section 3.01. Satisfaction of Claims. The treatment of and consideration to be received by Holders of Allowed Claims pursuant to this Article III and the Plan shall be in full satisfaction, settlement, release, extinguishment and discharge of their respective Claims against the Debtors and the Debtors' respective Estates, except as otherwise provided in the Plan or the Confirmation Order.

Section 3.02. Unclassified Claims, Classified Unimpaired and Impaired Claims and Classified Interests. Administrative Claims and Priority Tax Claims are treated in accordance with section 1129(a)(9)(A) and section 1129(a)(9)(C) of the Bankruptcy Code, respectively. Such Claims are

Unimpaired under the Plan and, in accordance with section 1123(a)(1) of the Bankruptcy Code, are not designated as Classes of Claims for purposes of this Plan and for purposes of sections 1123, 1124, 1126 and 1129 of the Bankruptcy Code. In addition, Class 1 Claims and Class 2 Claims are classified as Classes of Claims that are Unimpaired. In accordance with section 1126(f) of the Bankruptcy Code, the Holders of Claims in such Classes are conclusively presumed to have accepted the Plan and are not entitled to vote to accept or reject the Plan. Class 3 Claims, Class 4 Claims, Class 5 Claims, Class 6 Claims and Class 7 Claims are Impaired and the Holders thereof are entitled to vote to accept or reject the Plan on account of such Allowed Claims. Class 8 Interests and Class 9 Claims are Impaired under the Plan and the Holders thereof will neither receive nor retain any property on account of such Interests and Claims and, pursuant to section 1126(g) of the Bankruptcy Code, Holders of such Interests and Claims are conclusively presumed to have rejected the Plan and are not entitled to vote to accept or reject the Plan on account of such Interests and Claims.

Section 3.03 Administrative Claims. Administrative Claims are Unimpaired. Unless otherwise provided for herein, each Holder of an Allowed Administrative Claim shall receive in full satisfaction, settlement, release, extinguishment and discharge of such Claim: (a) the amount of such unpaid Allowed Claim in Cash from the Effective Date Cash (excluding the Cash in the Real Estate Tax Escrow Reserve), or in the case of any such unpaid Allowed Claim of FBR, from the Sale Proceeds; or (b) such other treatment on such other terms and conditions as may be agreed upon in writing by the

Holder of such Claim and the Debtors or the Liquidation Trustee, as the case may be, or as the Bankruptcy Court may order. Distributions to each Holder of Administrative Claims shall be made on or as soon as reasonably practicable after the later of (i) the Effective Date, (ii) the date on which such Administrative Claim becomes Allowed, or (iii) a date agreed to in writing by the Debtors or the Liquidation Trustee, as the case may be, and the Holder of such Administrative Claim.

Section 3.04. Priority Tax Claims. Priority Tax Claims are Unimpaired. Each Holder of an Allowed Priority Tax Claim shall receive in full satisfaction, settlement, release, extinguishment and discharge of such Priority Tax Claim: (a) the amount of such unpaid Allowed Priority Tax Claim in Cash from the Effective Date Cash (excluding the Cash in the Real Estate Tax Escrow Reserve); or (b) such other treatment on such other terms and conditions as may be agreed upon in writing by the Holder of such Priority Tax Claim and the Debtors or the Liquidation Trustee, as the case may be, or as the Bankruptcy Court may order. Prior to the Effective Date, the Debtors shall have the right, in their sole discretion, to prepay at any time, in whole or in part, any Allowed Priority Tax Claim without premium or penalty of any sort or nature. Distributions to each Holder of Priority Tax Claims shall be made on or as soon as reasonably practicable after the later of (i) the Effective Date, (ii) the date on which such Priority Tax Claim becomes Allowed or (iii) a date agreed to by the Debtors or the Liquidation Trustee, as the case may be, and the Holder of such Priority Tax Claim.

Section 3.05. Class 1: Miscellaneous Secured Claims. Class 1 Miscellaneous Secured Claims are Unimpaired. Each Holder of an Allowed Class 1 Miscellaneous Secured Claim shall receive in full satisfaction, settlement, release, extinguishment and discharge of such Claim: (a) Cash equal to the amount of such Allowed Miscellaneous Secured Claim from the Effective Date Cash (excluding the Cash in the Real Estate Tax Escrow Reserve); (b) Reinstatement of such Allowed Miscellaneous Secured Claim; (c) the Property securing such Miscellaneous Secured Claim; or (d) such other treatment on such other terms and conditions as may be agreed upon in writing by the Holder of such Claim and the Debtors or the Liquidation Trustee, as the case may be. Distributions to each Holder of Class 1 Miscellaneous Secured Claims shall be made on or as soon as reasonably practicable after the later of (i) the Effective Date, (ii) the date that such Miscellaneous Secured Claim becomes Allowed, or (iii) a date agreed to by the Debtors or the Liquidation Trustee, as the case may be, and the Holder of such Class 1 Miscellaneous Secured Claim.

Section 306. Class 2: Miscellaneous Priority Claims. Class 2 Miscellaneous Priority Claims are Unimpaired. Each Holder of an Allowed Class 2 Miscellaneous Priority Claim shall receive in full satisfaction, settlement, release, extinguishment and discharge of such Claim: (a) the amount of such unpaid Allowed Miscellaneous Priority Claim in Cash from the Effective Date Cash (excluding the Cash in the Real Estate Tax Escrow Reserve); or (b) such other treatment on such other terms and conditions as may be agreed upon in writing by the Holder of such Claim and the Debtors or the Liquidation Trustee, as the

case may be. Distributions to each Holder of Class 2 Miscellaneous Priority Claims shall be made on or as soon as reasonably practicable after the later of (i) the Effective Date, (ii) the date on which such Class 2 Claim becomes Allowed, or (iii) a date agreed to by the Debtors or the Liquidation Trustee, as the case may be, and the Holder of such Class 2 Miscellaneous Priority Claim.

Section 3.07. Class 3: Lender Secured Claim. The Class 3 Lender Secured Claim is Impaired. The Holder of the Allowed Class 3 Lender Secured Claim shall receive in full satisfaction, settlement, release, extinguishment and discharge of such Claim: (a) the Sale Proceeds in Cash after satisfaction in full of (i) any Allowed Administrative Claim of FBR and (ii) all Allowed Class 4 Claims (as may be determined by the California State Court); and (b) the balance of any Effective Date Cash (excluding Cash in the Real Estate Tax Escrow Reserve) after satisfaction in full of any Allowed Administrative Claims, any Allowed Priority Tax Claims, any Allowed Class 1 Claims, any Allowed Class 2 Claims, any monetary cure amounts that are required to be paid to nondebtor parties to executory contracts and unexpired leases in connection with the assumption or assumption and assignment of such executory contracts and unexpired leases by the Debtors and, only to the extent that the Cash in the Real Estate Tax Escrow Reserve is insufficient, the Allowed Los Angeles County Tax Collector Claim; or (c) such other treatment on such other terms and conditions as may be agreed upon in writing by the Holder of such Claim and the Debtors or the Liquidation Trustee, as the case may be. Distributions to the Holder of Class 3 Lender Secured Claim shall be made on or as soon as reasonably practicable after the

later of (i) the Effective Date, (ii) the date on which such Class 3 Claim becomes Allowed, (iii) the entry of one or more Final Orders by the California State Court in the Bonded Stop Notice Mechanic's Lien Litigation determining the amount and validity of the Bonded Stop Notice Mechanic's Lien Claims, or (iv) a date agreed to by the Debtors or the Liquidation Trustee, as the case may be, and the Holder of such Class 3 Lender Secured Claim.

Section 3.08. Class 4: Bonded Stop Notice Mechanic's Lien Claims. Class 4 Bonded Stop Notice Mechanic's Lien Claims are Impaired. Each Holder of an Allowed Class 4 Bonded Stop Notice Mechanic's Lien Claim shall receive in full satisfaction, settlement, release, extinguishment and discharge of such Claim its Pro Rata Share of: (a) the Sale Proceeds in Cash after satisfaction in full of any Allowed Administrative Claim of FBR; or (b) such other treatment on such other terms and conditions as may be agreed upon in writing by the Holder of such Claim and the Debtors or the Liquidation Trustee, as the case may be. Distributions to the Holders of Class 4 Bonded Stop Notice Mechanic's Lien Claims shall be made on or as soon as reasonably practicable after the later of (i) the Effective Date, (ii) the date on which such Class 4 Claim becomes Allowed, (iii) the entry of one or more Final Orders by the California State Court in the Bonded Stop Notice Mechanic's Lien Litigation determining the amount and validity of the Bonded Stop Notice Mechanic's Lien Claims, or (iv) a date agreed to by the Debtors or the Liquidation Trustee, as the case may be, and the Holder of such Class 4 Bonded Stop Notice Mechanic's Lien Claim. Notwithstanding the foregoing, Distributions to Holders of Allowed Class 4 Claims shall only be made

to the extent the Lender has not reserved sufficient Cash to satisfy all such Claims that may be deemed valid and enforceable against the Lender by the California State Court in the Bonded Stop Notice Mechanic's Lien Litigation.

Section 3.09. Class 5: Los Angeles County Tax Collector Claim. The Class 5 Los Angeles County Tax Collector Claim is Impaired. The Holder of the Allowed Class 5 Claim shall receive in full satisfaction, settlement, release, extinguishment and discharge of such Claim: (a) the amount of such unpaid Allowed Claim without interest in Cash from the Real Estate Tax Escrow Reserve (or Effective Date Cash in the event the funds in the Real Estate Tax Escrow Reserve are insufficient); or (b) such other treatment on such other terms and conditions as may be agreed upon in writing by the Holder of such Claim and the Debtors or the Liquidation Trustee, as the case may be. Distributions to the Holder of the Allowed Class 5 Los Angeles County Tax Collector Claim shall be made on as soon as reasonably practicable after the later of (i) the Effective Date, (ii) the date on which such Class 5 Claim becomes Allowed, or (iii) a date agreed to by the Debtors or the Liquidation Trustee, as the case may be, and the Holder of such Class 5 Los Angeles County Tax Collector Claim.

Section 3.10. Class 6: General Unsecured Claims. Class 6 General Unsecured Claims are Impaired. Each Holder of an Allowed Class 6 Claim shall receive in full satisfaction, settlement, release, extinguishment and discharge of such Claim its Pro Rata Share of: (a) $500,000 in Cash from the Creditor Profit Sharing Income; or (b) such other treatment on such other terms and conditions as may be agreed

upon in writing by the Holder of such Claim and the Debtors or the Liquidation Trustee, as the case may be. Distributions to Holders of Class 6 General Unsecured Claims shall be made as follows: (i) the first Cash distribution of $100,000 shall be made within ninety (90) Days following the expiration of the first Operating Year, the second Cash distribution of $200,000 shall be made within ninety (90) Days following the expiration of the second Operating Year, and the third Cash distribution of $200,000 shall be made within ninety (90) Days following the expiration of the third Operating Year; or (ii) other date(s) agreed to by the Debtors or the Liquidation Trustee, as the case may be, and the Holder of such Class 6 General Unsecured Claims.

Section 3.11. Class 7: Lender Deficiency Claim. The Class 7 Lender Deficiency Claim is Impaired. The Holder of the Allowed Class 7 Claim shall receive in full satisfaction, settlement, release, extinguishment and discharge of such Claim: (a) $250,000 in Cash from the Creditor Profit Sharing Income; or (b) such other treatment on such other terms and conditions as may be agreed upon in writing by the Holder of such Claim and the Debtors or the Liquidation Trustee, as the case may be. Distributions to the Holder of the Class 7 Lender Deficiency Claim shall be made as follows: (i) the first Cash distribution of $50,000 shall be made within ninety (90) Days following the expiration of the first Operating Year, the second Cash distribution of $100,000 shall be made within ninety (90) Days following the expiration of the second Operating Year, and the third Cash distribution of $100,000 shall be made within ninety (90) Days following the expiration of the third Operating Year; or (ii) other date(s) agreed to by the Debtors or the

Liquidation Trustee, as the case may be, and the Holder of such Class 7 Deficiency Claim.

Section 3.12. Class 8: Interests. Class 8 Interests are Impaired. Holders of Class 8 Interests shall not receive or retain any property under the Plan on account of such Interests. On the Effective Date, all Interests shall be cancelled.

Section 3.13. Class 9: Insider Claims. Class 9 Insider Claims are Impaired. Holders of Class 9 Insider Claims shall not receive or retain any property under the Plan on account of such Insider Claims. On the Effective Date, all Insider Claims shall be extinguished.

ARTICLE IV
ACCEPTANCE OR REJECTION OF THE PLAN; CRAMDOWN

Section 4.01. Acceptance by Impaired Classes of Claims and Interests. Pursuant to section 1126(c) of the Bankruptcy Code, an Impaired Class of Claims shall have accepted the Plan if: (a) the Holders of at least two-thirds (2/3) in dollar amount of the Allowed Claims actually voting in such Class (other than Claims held by any Holder designated pursuant to section 1126(e) of the Bankruptcy Code) have timely and properly voted to accept the Plan, and (b) more than one-half (1/2) in number of the Holders of such Allowed Claims actually voting in such Class (other than Claims held by any Holder designated pursuant to section 1126(e) of the Bankruptcy Code) have timely and properly voted to accept the Plan. No Class of Interests is entitled to vote on the Plan pursuant to section 1126 of the Bankruptcy Code.

Section 4.02. Voting Classes. Except as otherwise required by the Bankruptcy Code or the Bankruptcy Rules or as otherwise provided in this Section 4.02, the Holders of Claims in Classes 3, 4, 5, 6 and 7 shall be entitled to vote to accept or reject the Plan in accordance with Section 4.01 of the Plan. Classes of Claims Unimpaired under the Plan (Miscellaneous Secured Claims (Class 1) and Miscellaneous Priority Claims (Class 2)) shall not be entitled to vote to accept or reject the Plan, and shall be conclusively presumed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code. The Class of Interests and Class of Claims that are Impaired under the Plan and whose Holders neither receive nor retain any property on account of such Claims and Interests under the Plan (Interests (Class 8) and Insider Claims (Class 9)) shall not be entitled to vote to accept or reject the Plan and shall be conclusively presumed to have rejected the Plan. Administrative Claims and Priority Tax Claims are Unimpaired and not classified under the Plan and hence are not entitled to vote to accept or reject the Plan pursuant to section 1126(g) of the Bankruptcy Code.

Section 4.03. Ballot Instructions. Each Holder of a Claim or Interest entitled to vote on the Plan will be asked to complete and return a Ballot to the Debtors and the Debtors will compile the votes so received. Any questions as to the validity, form, and eligibility (including time of receipt) of Ballots will be resolved by the Bankruptcy Court upon application or at the Confirmation Hearing.

Section 4.04. Cramdown. If all applicable requirements for Confirmation of the Plan are met as set forth in section 1129(a)(1) through (13) of the

Bankruptcy Code except subsection (8) thereof, the Debtors may request that the Bankruptcy Court confirm the Plan in accordance with section 1129(b) of the Bankruptcy Code, notwithstanding the requirements of section 1129(a)(8) thereof, on the bases that the Plan is fair and equitable, and does not discriminate unfairly with respect to each Class of Claims or Interests that is Impaired under, and has not accepted, the Plan.

ARTICLE V
PROVISIONS GOVERNING DISTRIBUTIONS UNDER THE PLAN

Section 5.01. Timing of Distributions. Except as specifically set forth in the Plan, distributions of Property will be made to Holders of Allowed Claims in accordance with Article III of the Plan. If a Claim is not an Allowed Claim as of the applicable distribution date, distributions will be made only if and when the Claim is Allowed, and then in accordance with Article III of the Plan and, with respect to the cure of defaults for assumed executory contracts and unexpired leases, Section 6.02 of the Plan, and in each case, subject to Article VIII of the Plan. Distributions to be made as of the Effective Date on account of Claims that are Allowed as of the Effective Date and are entitled to receive distributions under the Plan shall be made on the Effective Date or as soon as reasonably practicable thereafter.

Section 5.02. Distributions to Holders of Allowed Claims. Except as otherwise provided herein, the Liquidation Trustee or the Debtors shall make all distributions required under the Plan in a manner consistent with the Plan. Distributions to Holders of

Allowed Claims will be made in accordance with Article III of the Plan. On the Effective Date or as soon as is reasonably practicable thereafter, the Debtors shall deliver the Effective Date Cash and the Sale Proceeds to the Liquidation Trustee. The Purchaser shall also deliver the Creditor Profit Sharing Income to the Liquidation Trustee, with $150,000 in Cash delivered to the Liquidation Trustee within sixty (60) Days following the expiration of the first Operating Year, $300,000 in Cash delivered to the Liquidation Trustee within sixty (60) Days following the expiration of the second Operating Year, and $300,000 in Cash delivered to the Liquidation Trustee within sixty (60) Days following the expiration of the third Operating Year.

Section 5.03. Liquidating Trust. The Liquidating Trust shall be established to receive the Effective Date Cash, the Sale Proceeds, the Creditor Profit Sharing Income and all other property of the Debtors not conveyed to the Purchaser in accordance with the Asset Purchase Agreement and to distribute such property and the proceeds of such property to Holders of Allowed Claims and Interests in accordance with the Plan. The Liquidating Trust shall qualify as a liquidating trust as described in Treasury Regulation section 301.7701-4(d) and shall be treated as a grantor trust for United States federal income tax purposes. The Debtors shall appoint the Liquidation Trustee, who shall have the authority to manage the day-to-day operations of the Liquidating Trust, including, without limitation, by disposing of the assets of the Liquidating Trust, appearing as a party in interest, calculating distributions, paying taxes and such other matters as more particularly described in Section 7.04 of the Plan and the Liquidating Trust Agreement. Subject to the

distributions required to be made under the Plan, expenses of the Liquidating Trust, including the expenses of the Liquidation Trustee and his representatives and professionals, will be satisfied from the assets of the Liquidating Trust and its proceeds, as set forth in the Liquidating Trust Agreement.

Section 5.04. Delivery of Distributions. Distributions to Holders of Allowed Claims shall be made by the Liquidation Trustee or the Debtors, as the case may be: (a) at the last known addresses of such Holders or (b) at the addresses set forth in any written notices of address changes delivered to the Debtors or the Liquidation Trustee, as appropriate. If any Holder's distribution is returned as undeliverable, no further distributions to such Holder shall be made unless and until the Liquidation Trustee or the Debtors, as the case may be, are notified of such Holder's then current address, at which time all missed distributions shall be made to such Holder without interest.

Section 5.05. Method of Cash Distributions. Any Cash payment to be made pursuant to the Plan may be made by Cash, draft, check, wire transfer, or as otherwise required or provided in any relevant agreement or applicable law at the option of the Liquidation Trustee or the Debtors, as the case may be.

Section 5.06. Failure to Negotiate Checks. Checks issued in respect of distributions under the Plan shall be null and void if not negotiated within sixty (60) Days after the date of issuance. Any amounts returned to the Liquidation Trustee in respect of such

non-negotiated checks shall be held by the Liquidation Trustee. Requests for reissuance for any such check shall be made directly to the issuer of the check by the Holder of the Allowed Claim with respect to which such check originally was issued. All amounts represented by any voided check will be held until the earlier of: (a) one (1) month after date on which the check is voided, or (b) the date on which the Bankruptcy Court enters the Final Decree, and all requests for reissuance by the Holder of the Allowed Claim in respect of a voided check are required to be made prior to such date. Thereafter, all such amounts shall be deemed to be Unclaimed Property, in accordance with Section 5.07 of the Plan, and all Holders of Claims in respect of void checks shall be forever barred, estopped and enjoined from asserting a claim to such funds in any manner against the Debtors or their respective assets, the Liquidation Trustee or the Liquidating Trust.

Section 5.07. Unclaimed Distributions. All Property distributed on account of Claims must be claimed prior to the date on which the Bankruptcy Court enters the Final Decree, or, in the case of a distribution made in the form of a check, must be negotiated and a request for reissuance be made as provided for in Section 5.06 of the Plan. All Unclaimed Property will be retained by and will vest in the Liquidating Trust. All full or partial payments made by the Debtors and received by the Holder of a Claim prior to the Effective Date will be deemed to be payments under the Plan for purposes of satisfying the obligations of the Debtors or the Liquidation Trustee pursuant to the Plan. Nothing contained in the Plan shall require the Debtors or the Liquidation Trustee to attempt to locate any Holder of an Allowed Claim

other than by reviewing the records of the Debtors and any Claims filed in the Chapter 11 Cases. Pursuant to section 1143 of the Bankruptcy Code, all claims in respect of Unclaimed Property shall be deemed Disallowed and the Holder of any Claim Disallowed in accordance with this Section 5.07 will be forever barred, expunged, estopped and enjoined from asserting such Claim in any manner against the Debtors or their respective assets, the Liquidation Trustee or the Liquidating Trust.

Section 5.08. Limitation on Distribution Rights. If a claimant holds more than one Claim in any one Class, all Claims of the claimant in that Class will be aggregated into one Claim and one distribution will be made with respect to the aggregated Claim.

Section 5.09. Fractional Dollars. Notwithstanding any other provision of the Plan, Cash distributions of fractions of dollars will not be made; rather, whenever any payment of a fraction of a dollar would be called for, the actual payment made shall reflect a rounding of such fraction to the nearest whole dollar (up or down), with half dollars being rounded down. To the extent that Cash remains undistributed as a result of the rounding of such fraction to the nearest whole cent, such Cash shall be treated as Unclaimed Property pursuant to Section 5.07 of this Plan.

Section 5.10. Compliance With Tax Requirements. In connection with each distribution with respect to which the filing of an information return (such as an Internal Revenue Service Form 1099 or 1042) or withholding is required, the Debtors or the Liquidation Trustee, as appropriate, shall file such information return with the Internal Revenue Service and provide

any required statements in connection therewith to the recipients of such distribution or effect any such withholding and deposit all moneys so withheld as required by law. With respect to any Person from whom a tax identification number, certified tax identification number or other tax information required by law to avoid withholding has not been received by the Debtors or the Liquidation Trustee within thirty (30) Days from the date of such request, the Debtors or the Liquidation Trustee may, at their or its option, withhold the amount required and distribute the balance to such Person or decline to make such distribution until the information is received.

Section 5.11. De Minimis Distributions. No Cash payment of less than twenty-five ($25.00) dollars shall be made to any Holder of an Allowed Claim on account of such Allowed Claim.

ARTICLE VI
EXECUTORY CONTRACTS AND UNEXPIRED LEASES

Section 6.01. Treatment of Executory Contracts and Unexpired Leases. All executory contracts and unexpired leases of the Debtors shall be deemed rejected by the Debtors as of the Effective Date, except for any executory contract or unexpired lease that: (a) has previously been assumed, assumed and assigned, or rejected pursuant to an order of the Bankruptcy Court on or prior to the Confirmation Date, (b) is the subject of a pending motion to assume, assume and assign, or reject as of the Confirmation Date, or (c) is listed on the Schedule of Assumed Contracts, provided, however, that the Debtors and the Purchaser shall

have the right, at any time prior to the Confirmation Date, to amend the Schedule of Assumed Contracts in any manner set forth in the Asset Purchase Agreement, the Sale and Bid Procedures Motion, or by any other means approved by the Court, or to delete any executory contract or unexpired lease listed therein, thus providing for its rejection pursuant to this Section 6.01, or to add any executory contract or unexpired lease thereto, thus providing for its assumption and assignment pursuant to this Section 6.01 and the terms of the Asset Purchase Agreement. The assumption, assumption and assignment, and rejection of executory leases and unexpired contracts under this Plan shall be governed by the terms of the Asset Purchase Agreement, the Sale Documents, the Sale and Bid Procedures, and other orders of the Bankruptcy Court.

Section 6.02. Cure of Defaults for Assumed Contracts and Leases. The cure of all defaults under executory contracts and unexpired leases to be assumed and assigned under the Asset Purchase Agreement, including the resolution of all objections to the adequacy of assurance of future performance under such contracts and leases and as to the adequacy of amounts proposed to cure defaults under such contracts and leases, shall be governed by the terms and conditions of the Sale and Bid Procedures, the Asset Purchase Agreement, the Sale Documents, any order approving the Asset Purchase Agreement or authorizing the Sale, and other orders of the Court. All such cure amounts shall be satisfied by the Debtors from Effective Date Cash.

Section 6.03. Bar Date for Claims for Rejection Damages. Claims arising out of the rejection of any

executory contract or unexpired lease pursuant to Article VI of the Plan must be filed with the Bankruptcy Court no later than the later of (a) twenty (20) Days after the Effective Date, or (b) thirty (30) Days after the entry of an order rejecting such executory contract or unexpired lease. Any Claim not filed within such time period shall be forever barred. The Debtors and the Liquidation Trustee shall have the right to object to any Claim arising out of the rejection of an executory contract or unexpired lease pursuant to the terms of Section 8.05 of this Plan.

Section 6.04. Treatment of Rejection Claims. The Bankruptcy Court shall determine any objections Filed in accordance with Section 8.05 hereof at a hearing to be held on a date to be determined by the Bankruptcy Court. Subject to any statutory limitation, including, but not limited to the limitations contained in sections 502(b)(6) and 502(b)(7) of the Bankruptcy Code, any Claims arising out of the rejection of executory contracts and unexpired leases shall, pursuant to section 502(g) of the Bankruptcy Code, be Impaired and treated as Class 5 Claims in accordance with Section 3.09 of the Plan.

ARTICLE VII
MEANS FOR IMPLEMENTATION OF THE PLAN

Section 7.01. The Sale. The Confirmation Order shall grant the relief requested in the Sale and Bid Procedures Motion and authorize a sale of certain or substantially all of the Debtors' assets under sections 365, 1123(b)(4), 1129(b)(2)(A)(iii), 1145 and 1146(a) of the Bankruptcy Code under the terms and conditions of the Asset Purchase Agreement. Any Sale conducted

via Auction shall be conducted in accordance with applicable orders of the Court, including, without limitation, interim or other orders approving the Sale and Bid Procedures Motion (prior to entry of the Confirmation Order). Upon Confirmation, the Debtors shall be authorized to take any and all actions necessary to consummate the Sale.

Section 7.02. Dissolution of the Debtors. The Confirmation Order shall authorize: (a) the dissolution of the Debtors, effective as of the Effective Date; and (b) the filing of certificates of dissolution (or the equivalent) with the Delaware Secretary of State. On the Effective Date, each of the manager and officers of the Debtors shall be deemed to have resigned from all of their respective positions with the Debtors.

Section 7.03. Liquidating Trust. The Liquidating Trust shall be established to receive on the Effective Date the Effective Date Cash, the Sale Proceeds and all other property of the Debtors not conveyed to the Purchaser in accordance with the Asset Purchase Agreement. The Liquidating Trust shall also receive a total of $750,000 of Creditor Profit Sharing Income, with $150,000 in Cash delivered to the Liquidation Trustee within sixty (60) Days following the expiration of the first Operating Year, $300,000 in Cash delivered to the Liquidation Trustee within sixty (60) Days following the expiration of the second Operating Year, and $300,000 in Cash delivered to the Liquidation Trustee within sixty (60) Days following the expiration of the third Operating Year. All of the assets delivered to the Liquidation Trustee shall vest in the Liquidating Trust when delivered free and clear of all Claims, encumbrances and interests pursuant to

section 1141 of the Bankruptcy Code, but subject to the rights of Holders of Allowed Claims to obtain the distributions provided for in this Plan.

Section 7.04. Powers and Duties of the Liquidation Trustee. The Liquidation Trustee shall administer the Liquidating Trust and its assets in accordance with this Plan, the Liquidating Trust Agreement, and the other Liquidating Trust Documents and shall be responsible for, among other things, making distributions required under this Plan. From and after the Effective Date and continuing through the date of entry of a Final Decree, the Liquidation Trustee shall: (a) possess the rights of a party in interest pursuant to section 1109(b) of the Bankruptcy Code for all matters arising in, arising under, or related to the Chapter 11 Cases and, in connection therewith, shall (i) have the right to appear and be heard on matters brought before the Bankruptcy Court or other courts, (ii) be entitled to notice and opportunity for hearing on all such issues, (iii) participate in all matters brought before the Bankruptcy Court, and (iv) receive notice of all applications, motions, and other papers and pleadings filed in the Bankruptcy Court; (b) have the authority to act on behalf of the Debtors in all adversary proceedings and contested matters pending in the Bankruptcy Court and in all actions and proceedings pending elsewhere; and (c) have the authority to retain such personnel or professionals (including, without limitation, legal counsel, financial advisors or other agents that have provided professional services to the Debtors prior to the Effective Date) as it deems appropriate and compensate such personnel and professionals as it deems appropriate, all without prior notice to or approval of the Bankruptcy Court. Professionals and

personnel retained or employed by the Liquidating Trust or the Liquidation Trustee need not be disinterested as that term is defined in the Bankruptcy Code.

Section 7.05. Obligations of the Purchaser. In accordance with the terms of the Plan the Purchaser shall, among other things, make one or more distributions to the Liquidation Trustee in accordance with Section 5.02 of the Plan.

Section 7.06. Application of Sale Proceeds. The Sale Proceeds shall be first distributed to satisfy any Allowed Administrative Claim of FBR in accordance with Section 3.03 of the Plan, then to the Holders of Allowed Bonded Stop Notice Mechanic's Lien Claims in accordance with Section 3.08 of the Plan, then to the Holder of the Allowed Lender Secured Claim in accordance with Section 3.07 of the Plan.

Section 7.07. Application of Cash in the Real Estate Tax Escrow Reserve. Cash in the Real Estate Tax Escrow Reserve shall be distributed to the Holder of the Allowed Los Angeles County Tax Collector Claim in accordance with Section 3.09 of the Plan.

Section 7.08. Application of Effective Date Cash. Effective Date Cash (excluding Cash in the Real Estate Tax Escrow Reserve) shall be first distributed to each Holder of Allowed Administrative Claims, Allowed Priority Tax Claims, Allowed Class 1 Claims, Allowed Class 2 Claims, nondebtor parties to executory contracts and unexpired leases to the extent monetary cure amounts are required to be paid to such parties in connection with the assumption or assumption and assignment of such executory contracts and unexpired

leases by the Debtors and, only to the extent that the Cash in the Real Estate Tax Escrow Reserve is insufficient, to the Holder of the Allowed Los Angeles County Tax Collector Claim, in accordance with Sections 3.03, 3.04, 3.05, 3.06, 3.09 and 6.02 of the Plan. The balance of the Effective Date Cash shall be distributed to the Holder of the Allowed Lender Secured Claim in accordance with Section 3.07 of the Plan.

Section 7.09. Application of Creditor Profit Sharing Income. Creditor Profit Sharing Income shall be distributed to Holders of Allowed General Unsecured Claims and Allowed Lender Deficiency Claims in accordance with Sections 3.10 and 3.11 of the Plan.

Section 7.10. Approval of Agreements. The solicitation of votes on the Plan shall be deemed a solicitation of the Holders of Claims for the approval of the Asset Purchase Agreement and the Sale in accordance with the Sale and Bid Procedures Motion. Entry of the Confirmation Order shall constitute approval of such agreements and transactions and the Confirmation Order shall so provide.

Section 7.11. Corporate Action. The entry of the Confirmation Order shall constitute authorization for the Debtors to take or to cause to be taken all limited liability company actions necessary or appropriate to consummate and implement the provisions of the Plan prior to, on and after the Effective Date, and all such actions taken or caused to be taken shall be deemed to have been authorized and approved by the Bankruptcy Court, including, without limitation, the execution and delivery of the Asset Purchase Agreement. Subject to the terms and conditions of the Asset Purchase

Agreement, all such actions shall be deemed to have occurred and shall be in effect pursuant to applicable non-bankruptcy law and the Bankruptcy Code, without any requirement of further action by the stockholders or directors of the Debtors. On the Effective Date, the Debtors' appropriate officers, managers, or other authorized Persons are authorized and directed to execute and deliver the agreements, documents and instruments contemplated by the Plan, the Plan Supplement and the Sale Documents in the name and on behalf of the Debtors.

Section 7.12. Revesting of Assets. Except as otherwise expressly provided in the Plan, pursuant to sections 1123(a)(5), 1123(b)(3) and 1141(b) of the Bankruptcy Code, all Property comprising the Estates of each Debtor not conveyed to the Purchaser under the Asset Purchase Agreement shall automatically vest in the Liquidating Trust, free and clear of all Claims, Liens, contractually-imposed restrictions, charges, encumbrances and Interests of Creditors and equity security holders on the Effective Date, with all such Claims, Liens, contractually-imposed restrictions, charges, encumbrances and Interests being extinguished except as otherwise provided in the Plan.

ARTICLE VIII
PRESERVATION OF CAUSES OF ACTION AND RIGHT TO DEFEND AND CONTEST

Section 8.01. Preservation of Rights. Except to the extent that any Claim is Allowed during the Chapter 11 Cases or expressly by this Plan, the Asset Purchase Agreement, or the Confirmation Order, nothing, including, but not limited to, the failure of the Debtors or the Liquidation Trustee to object to a Claim or

Interest for any reason during the pendency of the Chapter 11 Cases shall affect, prejudice, diminish or impair the rights and legal and equitable defenses of the Debtors, the Liquidation Trustee or the Purchaser with respect to any Claim or Interest, including, but not limited to, all rights of the Debtors, Liquidation Trustee or the Purchaser to contest or defend themselves against such Claims or Interests in any lawful manner or forum when and if such Claim or Interest is sought to be enforced by the Holder thereof.

Section 8.02. Rights of Action. Except as otherwise provided in the Plan, the Asset Purchase Agreement or the Confirmation Order, all Causes of Action, including Avoidance Actions, shall automatically be transferred to and become the property of the Liquidating Trust. Pursuant to section 1123(b)(3) of the Bankruptcy Code, the Liquidation Trustee (as a representative of the Debtors' Estates) will have the right to enforce and prosecute such Causes of Action against any Entity that arose before the Effective Date other than those expressly conveyed, released or compromised as part of or pursuant to the Plan or the Asset Purchase Agreement.

Section 8.03. Setoffs. Except to the extent that any Claim is Allowed, the Debtors, the Liquidation Trustee or the Purchaser, as applicable, may, but shall not be required to, set off against any Claims and the payments or distributions to be made pursuant to the Plan in respect of such Claims, any and all debts, liabilities, Causes of Action and claims of every type and nature whatsoever which the Estates, the Debtors or the Liquidation Trustee may have against such Creditors, but neither the failure to do so nor the allowance of any such Claims, whether pursuant to the

Plan or otherwise, shall constitute a waiver or release by the Debtors, the Liquidation Trustee or the Purchaser of any such claims or Causes of Action the Debtors or the Liquidation Trustee may have against such Creditors, and all such claims and Causes of Action which are not expressly released, conveyed or compromised pursuant to the Plan, the Asset Purchase Agreement or the Sale Order shall be conveyed to the Liquidating Trust.

Section 8.04. No Payment or Distribution Pending Allowance. All references to Claims and amounts of Claims refer to the amount of the Claim Allowed by agreement of the Debtors, the Liquidation Trustee or the Purchaser and the Holder of such Claim, by operation of law, by Final Order, or by this Plan. Notwithstanding any other provision in the Plan, no payment or distribution shall be made on account of or with respect to any Claim to the extent it is a Disputed Claim unless and until the Disputed Claim becomes an Allowed Claim.

Section 8.05. Resolution of Disputed Claims. Unless otherwise ordered by the Court after notice and a hearing, the Liquidation Trustee shall have the right, on and after the Effective Date, to File objections to Claims and shall serve a copy of each such objection upon the Holder of the Claim to which the objection is made as soon as practicable, but in no event later than the applicable Claims Objection Deadline. The foregoing deadlines may be extended by order of the Court. An objection to any Claim shall be deemed properly served on the Holder thereof if the Liquidation Trustee effects service in any of the following manners: (a) in accordance with Rule 4 of the Federal Rules of Civil Procedure, as modified and

made applicable by Federal Rule of Bankruptcy Procedure 7004; (b) by first class mail, postage prepaid, on the signatory on the proof of claim or other representative identified in the proof of claim or any attachment thereto; or (c) by first class mail, postage prepaid, on any counsel that has appeared on the Holder's behalf in the Chapter 11 Cases.

ARTICLE IX
CONDITIONS TO CONSUMMATION OF THE PLAN

Section 9.01. Confirmation Order. The Confirmation Order shall not be entered unless and until all conditions to entry of the Confirmation Order set forth in the Asset Purchase Agreement have been met.

Section 9.02. Conditions to Effective Date. The Plan shall not be consummated, and the Effective Date shall not occur, unless and until each of the following conditions have occurred or have been duly waived (if waivable) pursuant to Section 9.03 below:

a) the Bankruptcy Court shall have approved the information contained in the Disclosure Statement as adequate;

b) the Confirmation Order shall have been entered and become a Final Order and shall not be stayed by order of a court of competent jurisdiction;

c) all conditions precedent to the obligations of the Debtors and the Purchaser under the Asset Purchase Agreement have occurred;

d) the transactions contemplated in the Asset Purchase Agreement have been consummated;

e) the Bankruptcy Court shall have entered an *order (contemplated to be part of the* Confirmation Order), which shall have become a Final Order, authorizing and directing the Debtors to take all actions necessary or appropriate to enter into, implement, and consummate the documents created, amended, supplemented, modified or adopted in connection with the Plan;

f) all authorizations, consents and regulatory approvals required, if any, in connection with the Plan's effectiveness shall have been obtained;

g) the Debtors shall have appointed the Liquidation Trustee, the parties shall have *executed the Liquidating Trust Agreement* and the other Liquidating Trust Documents, and the Liquidation Trustee shall have received the Sale Proceeds and the Effective Date Cash;

h) no order of any court shall have been entered and shall remain in effect restraining the Debtors from consummating the Plan; and

i) each of the foregoing conditions shall have occurred (or been waived) on or before November 23, 2011.

Section 9.03. Waiver of Conditions to Consummation. The conditions to consummation in Section 9.02 (other than Sections 9.02(a), (b) and (d)) may be waived at any time by a writing signed by an authorized representative of the Debtors without notice or order of the Bankruptcy Court or any further action other than proceeding to consummation of the Plan. Notwithstanding the foregoing, the conditions to consummation in Section 9.02 and the Asset Purchase Agreement may only be waived in accordance with the terms of the Asset Purchase Agreement.

Section 9.04. Effect of Failure or Absence of Waiver of Conditions Precedent to the Effective Date of the Plan. In the event that one or more of the conditions specified in Section 9.02 of the Plan have not occurred (or been waived), upon notification submitted by the Debtors to the Bankruptcy Court: (a) the Confirmation Order, automatically and without further order of the Bankruptcy Court, shall be, and shall be deemed, vacated, null and void, with no force or legal effect whatsoever; (b) no distributions under the Plan shall be made; (c) all Property of the Estates shall revest in the Debtors' Estates; (d) the Debtors and all Holders of Claims and Interests shall be restored to the status quo ante as of the day immediately preceding the Confirmation Date as though the Confirmation Date never occurred; (e) the Asset Purchase Agreement shall become null and void; and (f) the Debtors' obligations with respect to the Claims and Interests shall remain unchanged and nothing contained herein shall constitute or be deemed a waiver or release of any Claims or Interests by or against the Debtors or any other Person or Entity or to prejudice in any manner the rights of the Debtors or

any Person or Entity in any further proceedings involving the Debtors.

ARTICLE X
EFFECTS OF CONFIRMATION

Section 10.01. Discharge. To the fullest extent permitted by applicable law (including, without limitation, section 105 of the Bankruptcy Code), and except as otherwise provided in the Plan or in the Confirmation Order, all consideration distributed under the Plan shall be in exchange for, and in complete satisfaction, settlement, discharge and release of, all Claims of any nature whatsoever against the Debtors or any of their assets or properties, regardless of whether any Property shall have been distributed or retained pursuant to the Plan on account of such Claims. Upon the Effective Date, and except as expressly contemplated in this Plan, the Debtors, and each of them, shall be deemed discharged and released under section 1141(d)(1)(A) of the Bankruptcy Code from any and all Claims, including, but not limited to, demands and liabilities that arose before the Effective Date, debts (as such term is defined in section 101(12) of the Bankruptcy Code), Liens, security interests, and encumbrances of and against all Property of the respective Estates or the Debtors that arose prior to the Effective Date, including without limitation, all debts of the kind specified in sections 502(g), 502(h) or 502(i) of the Bankruptcy Code, whether or not (a) such Claim has been Allowed pursuant to section 502 of the Bankruptcy Code, or (b) the Holder of such Claim has voted to accept the Plan. Further, as of the Effective Date, all entities, including, without limitation, all Holders of Claims or Interests, shall be barred and

enjoined from asserting against the Debtors, the Liquidating Trust, the Liquidation Trustee, the Purchaser, their property or their successors or assigns any other or further Claims, debts, rights, Causes of Action, liabilities or Interests relating to the Debtors based upon any act, omission, transaction or other activity of any nature that occurred prior to the Effective Date, except for those obligations expressly created by, or reserved in, this Plan. In accordance with the foregoing, except as provided in the Plan or the Confirmation Order, the Confirmation Order shall be a judicial determination of discharge of all such Claims and other debts and liabilities against the Debtors and termination of all Interests, pursuant to sections 524 and 1141 of the Bankruptcy Code, and such discharge and termination shall void any judgment obtained against the Debtors, the Liquidating Trust, the Liquidation Trustee or the Purchaser at any time, to the extent that such judgment relates to a discharged Claim or terminated Interest.

Section 10.02. Injunction.

(a) Discharged Claims and Terminated Interests. Except as otherwise expressly provided for in the Plan or the Confirmation Order and to the fullest extent authorized or provided by the Bankruptcy Code, including sections 524 and 1141 thereof, the entry of the Confirmation Order shall, provided that the Effective Date occurs, permanently enjoin all Persons that have held, currently hold or may hold a Claim or other debt or liability that is Impaired or discharged or an Interest or other right of an equity security holder that is Impaired or terminated pursuant to the terms of the Plan from

taking any of the following actions against the Debtors, the Liquidating Trust, the Liquidation Trustee, the Purchaser, or the Property of any of the foregoing on account of any such discharged Claims, debts or liabilities or such terminated Interests or rights: (a) commencing, conducting or continuing in any manner, directly or indirectly, any suit, action or other proceeding of any kind; (b) enforcing, levying, attaching, collecting or otherwise recovering in any manner or by any means, whether directly or indirectly, any judgment, award, decree or order; (c) creating, perfecting or enforcing in any manner, directly or indirectly, any Lien or encumbrance of any kind; (d) asserting any setoff, offset, right of subrogation or recoupment of any kind, directly or indirectly, against any debt, liability or obligation due to the Debtors; and (e) proceeding in any manner in any place whatsoever, including employing any process, that does not conform to or comply with or is inconsistent with the provisions of the Plan.

(b) Released Claims. As of the Effective Date, the Confirmation Order shall constitute an injunction permanently enjoining any Person that has held, currently holds or may hold a Claim, demand, debt, right, Cause of Action or liability that is released pursuant to Section 10.04 of the Plan from enforcing or attempting to enforce any such Claim, demand, debt, right, Cause of Action or liability against (i) the Debtors, (ii) the Liquidating Trust, (iii) any Releasee, or (iv) any Exculpated Person, or any of their respective Property, based on, arising from or relating to, in whole or in part, any act, omission, or other occurrence taking place on or prior to the Effective Date with respect to or in any way relating to the Chapter 11 Cases, all of which claims, demands, debts,

rights, Causes of Action or liabilities shall be deemed released on and as of the Effective Date; provided, however, that with respect to the former directors, officers and employees of the Debtors, this injunction shall apply only to the enforcement of Claims, demands, debts, rights, Causes of Action or liabilities with respect to which such former directors, officers and employees would be entitled to indemnification from the Debtors under contract or law; and, provided further, however, that this injunction shall not apply to (a) any claims Creditors may assert under the Plan to enforce their rights thereunder to the extent permitted by the Bankruptcy Code or (b) any claims Creditors or other third parties may have against each other, which claims are not related to the Debtors, it being understood, however, that any defenses, offsets or counterclaims of any kind or nature whatsoever which the Debtors may have or assert in respect of any of the claims of the type described in (a) or (b) of this Section 10.02(b) are fully preserved.

Section 10.03. Exculpation. None of the Debtors, the Liquidating Trustee, the Purchaser or any Exculpated Person shall have or incur any liability to any Person, including, without limitation, any Holder of a Claim or Interest or any other party in interest, or any of their respective agents, employees, representatives, financial advisors, attorneys or affiliates or any of their successors or assigns, for any act taken or omission made in connection with, relating to, or arising out of, the Chapter 11 Cases, Filing, negotiating, prosecuting, administering, formulating, implementing, confirming or consummating this Plan, or the Property to be distributed under this Plan, including all activities leading to the promulgation and confirmation of the

Plan, the Disclosure Statement (including any information provided or statement made in the Disclosure Statement or omitted therefrom), or any contract, instrument, release or other agreement or document created in connection with or related to the Plan or the administration of the Debtors or these Chapter 11 Cases, provided, however, that the foregoing exculpation shall not apply to any act that is determined by a Final Order to constitute gross negligence or willful misconduct.

Section 10.04. Releases.

(a) Releases by Debtors. Effective as of the Effective Date, and except as otherwise provided in the Plan or the Confirmation Order, for good and valuable consideration, the adequacy of which is hereby confirmed, the Debtors, in their individual capacities and as debtors in possession, will be deemed to have forever released, waived and discharged the Releasees from any and all claims, obligations, suits, judgments, damages, demands, debts, rights, Causes of Action and liabilities (other than the rights of the Debtors or the Liquidation Trustee to enforce the Plan and the contracts, instruments, releases, indentures and other agreements or documents delivered thereunder), whether for tort, contract, violations of federal or state securities laws, or otherwise, whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, then existing or thereafter arising, in law, equity or otherwise that are based in whole or part on any act, omission, transaction, event or other occurrence, including actions in connection with indebtedness for money borrowed by the Debtors, taking place on or prior to the Effective Date in any

way relating to the Debtors, the Chapter 11 Cases, or the Plan; provided, however, that the releases provided in this Section 10.04(a) shall not be applicable to any Holder of a Claim that timely votes to reject the Plan.

(b) Releases by Holders of Claims and Interests. Effective as of the Effective Date, and except as otherwise provided in the Plan or the Confirmation Order, to the fullest extent permitted under applicable law, in consideration for the obligations of the Persons set forth below under the Plan and, if applicable, the Cash, securities, contracts, releases and other agreements or documents to be delivered in connection with the Plan, each Holder of a Claim that votes in favor of the Plan, and any Affiliate of any such Holder (as well as any trustee or agent on behalf of each such Holder) shall be deemed to have forever waived, released and discharged (i) the Debtors, (ii) the Liquidation Trustee, (iii) the Liquidation Trust, and (iv) the Releasees from any and all claims, obligations, suits, judgments, damages, demands, debts, rights, Causes of Action and liabilities (other than the rights of the Debtors or Liquidation Trustee to enforce the Plan and the contracts, instruments, releases, indentures and other agreements or documents delivered thereunder), whether for tort, contract, violations of federal or state securities laws, or otherwise, whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, then existing or thereafter arising, in law, equity or otherwise that are based in whole or part on any act, omission, transaction, event or other occurrence, including actions in connection with indebtedness for money borrowed by the Debtors, taking place on or prior to

the Effective Date in any way relating to the Debtors, the Chapter 11 Cases, or the Plan.

Section 10.05. Other Documents and Actions. The Debtors are authorized to execute such documents and take such other action as is necessary or appropriate to effectuate the transactions provided for or contemplated by or in the Plan.

Section 10.06 Term of Injunctions or Stays. Unless otherwise provided herein or in the Confirmation Order, all injunctions or stays provided for in the Chapter 11 Cases under sections 105(a) or 362 of the Bankruptcy Code, or otherwise, and in existence on the Confirmation Date, shall remain in full force and effect until the Effective Date.

Section 10.07. Preservation of Insurance. Except as necessary to be consistent with the Plan, the Plan and the discharge provided herein shall not diminish or impair (a) the enforceability of insurance policies that may cover Claims against the Debtors or any other Person or Entity or (b) the continuation of any workers' compensation programs in effect, including self-insurance programs.

Section 10.08. Subordination Rights. Any distributions under the Plan shall be received and retained free of and from any obligations to hold or transfer the same to any other Creditor, and shall not be subject to levy, garnishment, attachment or other legal process by any Holder by reason of claimed contractual subordination rights, which rights shall be waived and the Confirmation Order shall constitute an injunction enjoining any Person from enforcing or attempting to enforce any contractual, legal or

equitable subordination rights to Property distributed under the Plan, in each case other than as provided in the Plan.

Section 10.09. No Successor Liability. Except as otherwise expressly provided in the Plan or the Asset Purchase Agreement, the Debtors, the Liquidation Trustee and the Purchaser do not, pursuant to the Plan or otherwise, assume, agree to perform, pay, or indemnify or otherwise have any responsibilities for any liabilities or obligations of the Debtors or any other party relating to or arising out of the operations of or assets of the Debtors, whether arising prior to, on, or after the Effective Date. The Liquidating Trust, the Liquidation Trustee and the Purchaser are not, and shall not be, successors to the Debtors by reason of any theory of law or equity, and none shall have any successor or transferee liability of any kind or character, except that the Liquidating Trustee and the Liquidation Trust shall assume the obligations specified in the Plan, the Liquidating Trust Agreement, the other Liquidating Trust Documents, and the Confirmation Order and the Purchaser shall assume the obligations specified in the Asset Purchase Agreement.

ARTICLE XI
RETENTION OF JURISDICTION

Section 11.01. Exclusive Jurisdiction of Bankruptcy Court. Notwithstanding the entry of the Confirmation Order and the occurrence of the Effective Date, the Bankruptcy Court shall retain after the Effective Date exclusive jurisdiction of all matters arising out of, arising in or related to the Chapter 11

Cases to the fullest extent permitted by applicable law, including, without limitation, jurisdiction to:

(a) classify or establish the priority or secured or unsecured status of any Claim (whether Filed before or after the Effective Date and whether or not contingent, Disputed or unliquidated) or resolve any dispute as to the treatment of any Claim pursuant to the Plan;

(b) grant or deny any applications for allowance of compensation or reimbursement of expenses pursuant to sections 330, 331 or 503(b) of the Bankruptcy Code or otherwise provided for in the Plan, for periods ending on or before the Effective Date;

(c) determine and resolve any matters related to the assumption, assumption and assignment or rejection of any executory contract or unexpired lease to which any Debtor is a party or with respect to which any Debtor may be liable, and to hear, determine and, if necessary, liquidate any Claims arising therefrom;

(d) ensure that all payments due under the Plan and performance of the provisions of the Plan are accomplished as provided herein and resolve any issues relating to distributions to Holders of Allowed Claims pursuant to the provisions of the Plan;

(e) construe, take any action and issue such orders, prior to and following the Confirmation Date and consistent with section 1142 of the Bankruptcy Code, as may be necessary for the enforcement, implementation, execution and consummation of the Plan and all contracts, instruments, releases, indentures and other agreements or documents

created in connection with the Plan, including, without limitation, the Disclosure Statement and the Confirmation Order, for the maintenance of the integrity of the Plan and protection of the Liquidation Trustee in accordance with sections 524 and 1141 of the Bankruptcy Code following consummation;

(f) determine and resolve any cases, controversies, suits or disputes that may arise in connection with the consummation, interpretation, implementation or enforcement of the Plan (and all Exhibits to the Plan and the Plan Supplement) or the Confirmation Order, including any indemnification and injunction provisions set forth in and contemplated by the Plan or the Confirmation Order, or any Entity's rights arising under or obligations incurred in connection therewith;

(g) hear any application of the Debtors or the Liquidation Trustee to modify the Plan after the Effective Date pursuant to section 1127 of the Bankruptcy Code and Section 12.04 hereof or modify the Disclosure Statement, the Confirmation Order or any contract, instrument, release, indenture or other agreement or document created in connection with the Plan, the Disclosure Statement or the Confirmation Order, or remedy any defect or omission or reconcile any inconsistency in any Bankruptcy Court order, the Plan, the Disclosure Statement, the Confirmation Order or any contract, instrument, release, indenture or other agreement or document created in connection with the Plan, the Disclosure Statement or the Confirmation Order, in such manner as may be necessary or appropriate to consummate the Plan, to the extent authorized by the Bankruptcy Code and the Plan;

(h) issue injunctions, enter and implement other orders or take such other actions as may be necessary or appropriate to restrain interference by any Entity with consummation, implementation or enforcement of the Plan or the Confirmation Order;

(i) enter and implement such orders as are necessary or appropriate if the Confirmation Order is for any reason modified, stayed, reversed, revoked or vacated;

(j) determine any other matters that may arise in connection with or relating to the Plan, the Disclosure Statement, the Confirmation Order, the Asset Purchase Agreement, or any contract, instrument, release, indenture or other agreement or document created in connection with the Plan, the Disclosure Statement, the Asset Purchase Agreement or the Confirmation Order, except as otherwise provided in the Plan;

(k) determine such other matters and for such other purposes as may be provided in the Confirmation Order;

(l) hear and determine any other matters related hereto and not inconsistent with chapter 11 of the Bankruptcy Code;

(m) hear and determine disputes arising in connection with the interpretation, implementation or enforcement of the Plan or the Asset Purchase Agreement;

(n) enter one or more Final Decrees closing each of the Chapter 11 Cases;

(o) determine and resolve any and all controversies relating to the rights and obligations of the Liquidation Trustee in connection with the Chapter 11 Cases;

(p) allow, disallow, determine, liquidate or estimate any Claim, including the compromise, settlement and resolution of any request for payment of any Claim, the resolution of any Objections to the allowance of Claims and to hear and determine any other issue presented hereby or arising hereunder, including during the pendency of any appeal relating to any Objection to such Claim (to the extent permitted under applicable law);

(q) permit the Debtors (and the Liquidation Trustee or the Purchaser, to the extent provided for in the Plan, the Asset Purchase Agreement or the Liquidating Trust Agreement) to recover all assets of the Debtors and Property of their respective Estates, wherever located;

(r) hear and determine any motions or contested matters involving taxes, tax refunds, tax attributes and tax benefits and similar or related matters with respect to the Debtors or the Debtors' respective Estates arising prior to the Effective Date or relating to the period of administration of the Chapter 11 Cases, including, without limitation, matters concerning federal, state and local taxes in accordance with sections 346, 505 and 1146 of the Bankruptcy Code;

(s) hear and determine any motions, applications, adversary proceedings, contested matters and other litigated matters pending on, Filed or

commenced after the Effective Date that may be commenced by the Liquidation Trustee thereafter, including Avoidance Actions, proceedings with respect to the rights of the Liquidation Trustee to recover Property under sections 542, 543 or 553 of the Bankruptcy Code, or proceedings to otherwise collect or recover on account of any claim or Cause of Action that the Debtors may have had; and

(t) hear any other matter not inconsistent with the Bankruptcy Code.

Section 11.02. Failure of Bankruptcy Court to Exercise Jurisdiction. If the Bankruptcy Court abstains from exercising or declines to exercise jurisdiction over any matter arising under, arising in or related to the Debtors, including with respect to the matters set forth above in Section 11.01 hereof, this Article XI shall not prohibit or limit the exercise of jurisdiction by any other court having competent jurisdiction with respect to such subject matter.

ARTICLE XII
MISCELLANEOUS PROVISIONS

Section 12.01. Binding Effect of Plan. The provisions of the Plan shall be binding upon and inure to the benefit of the Debtors, the Estates, the Liquidation Trustee, the Liquidating Trust, the Purchaser, any Holder of any Claim or Interest treated herein or any Person named or referred to in the Plan, and each of their respective heirs, executors, administrators, representatives, predecessors, successors, assigns, agents, officers and directors, and, to the fullest extent permitted under the Bankruptcy

Code and other applicable law, each other Person affected by the Plan.

Section 12.02 Withdrawal of the Plan. The Debtors reserve the right, at any time prior to Confirmation of the Plan, to withdraw the Plan. If the Plan is withdrawn, the Plan shall be null and void and have no force and effect. In such event, nothing contained herein shall be deemed to constitute a waiver or release of any claims by or against the Debtors or any other Person or to prejudice in any manner the rights of the Debtors or any Person in any further proceedings involving the Debtors.

Section 12.03. Final Order. Except as otherwise expressly provided in the Plan or the Asset Purchase Agreement, any requirement in the Plan for a Final Order may be waived by agreement of the Debtors and the Purchaser or, after the Effective Date, the Liquidation Trustee upon written notice to the Bankruptcy Court. No such waiver shall prejudice the right of any party in interest to seek a stay pending appeal of any order that is not a Final Order.

Section 12.04. Modification of the Plan. The Debtors may alter, amend or modify the Plan in accordance with section 1127 of the Bankruptcy Code or as otherwise permitted at any time prior to the Confirmation Date. After the Confirmation Date and prior to the substantial consummation of the Plan, and in accordance with the provisions of section 1127(b) of the Bankruptcy Code and the Bankruptcy Rules, the Debtors or the Liquidation Trustee may, so long as the treatment of Holders of Claims or Interests under the Plan is not adversely affected, institute proceedings in the Bankruptcy Court to remedy any defect or

omission or to reconcile any inconsistencies in the Plan, the Disclosure Statement or the Confirmation Order and any other matters as may be necessary to carry out the purposes and effects of the Plan; provided, however, prior notice of such proceedings shall be served in accordance with Bankruptcy Rules 2002 and 9014.

Section 12.05. Business Days. If any payment or act under the Plan is required to be made or performed on a date that is not a Business Day, then the making of such payment or the performance of such act may be completed on the next succeeding Business Day, but shall be deemed to have been completed as of the required date.

Section 12.06. Severability. Should the Bankruptcy Court determine, prior to the Confirmation Date, that any provision of the Plan is either illegal on its face or illegal as applied to any Claim or Interest, such provision shall be unenforceable as to all Holders of Claims or Interests or to the specific Holder of such Claim or Interest, as the case may be, as to which such provision is illegal. Unless otherwise determined by the Bankruptcy Court, such a determination of unenforceability shall in no way limit or affect the enforceability and operative effect of any other provision of the Plan. The Debtors reserve the right not to proceed with Confirmation or consummation of the Plan if any such ruling occurs.

Section 12.07. Governing Law. EXCEPT TO THE EXTENT THAT THE BANKRUPTCY CODE OR BANKRUPTCY RULES OR OTHER FEDERAL LAWS ARE APPLICABLE, AND SUBJECT TO THE

PROVISIONS OF ANY CONTRACT, INSTRUMENT, RELEASE, INDENTURE OR OTHER AGREEMENT OR DOCUMENT ENTERED INTO IN CONNECTION WITH THE PLAN, THE CONSTRUCTION, IMPLEMENTATION AND ENFORCEMENT OF THE PLAN AND ALL RIGHTS AND OBLIGATIONS ARISING UNDER THE PLAN SHALL BE GOVERNED BY, AND CONSTRUED AND ENFORCED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF ILLINOIS, WITHOUT GIVING EFFECT TO CONFLICTS-OF-LAW PRINCIPLES WHICH WOULD APPLY THE LAW OF A JURISDICTION OTHER THAN THE STATE OF ILLINOIS.

Section 12.08. Payment of Statutory Fees. All U.S. Trustee's Fee Claims, as determined, if necessary, by the Bankruptcy Court at the hearing pursuant to section 1128 of the Bankruptcy Code, shall be paid on or before the Effective Date by the Debtors.

Section 12.09. Post-Confirmation Operating Reports. The Liquidation Trustee shall file quarterly operating reports until such time as a Final Decree or other order is entered under section 350(a) of the Bankruptcy Code closing the Bankruptcy Cases.

Section 12.10. Notices. Any notice required or permitted to be provided under this Plan to the Debtors, or any request for information with respect to the Plan, shall be in writing and served by either (a) certified mail, return receipt requested, postage prepaid, (b) hand delivery or (c) reputable overnight delivery service, freight prepaid, to be addressed as follows:

RadLAX Gateway Hotel, LLC
c/o The Harp Group, Inc.
9501 Technology Boulevard, Ste. 401
Rosemont, Illinois 60018
Attn: Timothy Franzen
Email: tfranzen@theharpgroup.com

With a copy to:

Perkins Coie LLP
131 S. Dearborn St., Ste. 1700
Chicago, Illinois 60603
Attn.: David M. Neff
Email: dneff@perkinscoie.com

Section 12.11. Filing of Additional Documents. On or before substantial consummation of the Plan, the Debtors shall issue, execute, deliver, and File with the Bankruptcy Court or record any agreements and other documents, and take any action as may be necessary or appropriate to effectuate, consummate and further evidence the terms and conditions of the Plan.

Section 12.12. Section 1125 of the Bankruptcy Code.

(a) The Debtors have, and upon Confirmation of the Plan shall be deemed to have, solicited acceptances of the Plan in good faith and in compliance with the applicable provisions of the Bankruptcy Code and (b) the Debtors (and each of their respective Affiliates, officers, directors, employees, consultants, agents, advisors, members, attorneys, accountants, financial advisors, other representatives and Professionals) have participated in good faith and in compliance with the applicable provisions of the Bankruptcy Code in

any offer, issuance, sale, and purchase of any securities offered and sold under the Plan, and are not, and on account of any such offer, issuance, sale, solicitation, and/or purchase will not be, liable at any time for the violation of any applicable law, rule, or regulation governing the solicitation of acceptances or rejections of the Plan or any offer, issuance, sale, or purchase of any securities offered and sold under the Plan.

Section 12.13. Section 1146 Exemption. To the fullest extent permitted under section 1146(a) of the Bankruptcy Code, the issuance, transfer or exchange of any security under the Plan, if any, or the execution, delivery or recording of an instrument of transfer under the Plan, or the revesting, transfer or sale of any real or other Property of or to the Debtors or the Liquidating Trust, shall not be taxed under any state or local law imposing a stamp tax, transfer tax or similar tax or fee. Consistent with the foregoing, each recorder of deeds or similar official for any county, city or governmental unit in which any instrument hereunder is to be recorded shall, pursuant to the Confirmation Order, be ordered and directed to accept such instrument, without requiring the payment of any documentary stamp tax, deed stamps, stamp tax, transfer tax, mortgage recording tax, intangible tax or similar tax.

Section 12.14. Section 1145 Exemption. To the fullest extent permitted under section 1145 of the Bankruptcy Code, the issuance of any interests in the Liquidating Trust on or around the Effective Date shall be exempt from the registration requirements of Section 5 of the Securities Act and any and all federal, state and local laws requiring the registration or

licensing of an issuer, underwriter, broker or dealer in such securities.

Section 12.15. Time. Unless otherwise specified herein, in computing any period of time prescribed or allowed by the Plan, the day of the act or event from which the designated period begins to run shall not be included. The last day of the period so computed shall be included, unless it is not a Business Day, in which event the period runs until the end of next succeeding day that is a Business Day. Otherwise, the provisions of Bankruptcy Rule 9006 shall apply.

Section 12.16. No Attorneys' Fees. No attorneys' fees will be paid by the Debtors or the Liquidation Trustee with respect to any Claim or Interest except as expressly specified herein or by order of the Bankruptcy Court.

Section 12.17. No Injunctive Relief. No Claim or Interest shall under any circumstances be entitled to specific performance or other injunctive, equitable or other prospective relief.

Section 12.18. Continued Confidentiality Obligations. Pursuant to the terms thereof, any other Holder of a Claim or Interest, the Purchaser, and their respective predecessors, successors and assigns shall continue to be obligated and bound by the terms of any confidentiality agreement executed by them in connection with these Chapter 11 Cases or the Debtors, to the extent that such agreement, by its terms, may continue in effect after the Confirmation Date.

Section 12.19. No Admissions or Waivers. Notwithstanding anything herein to the contrary, nothing contained in the Plan shall be deemed an admission or waiver by the Debtors with respect to any matter set forth herein, including, without limitation, liability on any Claim or Interest or the propriety of any classification of any Claim or Interest.

Section 12.20. Entire Agreement. The Plan (and any Exhibits to the Plan and the Plan Supplement) sets forth the entire agreement and undertakings relating to the subject matter hereof and supersedes all prior discussions and documents. The Debtors shall not be bound by any terms, conditions, definitions, warranties, understandings, or representations with respect to the subject matter hereof, other than as expressly provided for herein or as may hereafter be agreed to by the parties in writing.

Section 12.21. Waiver. The Debtors reserve the right to waive any provision of this Plan to the extent such provision is for the sole benefit of the Debtors and/or their officers or directors.

Section 12.22. Bar Date for Professionals. Applications for compensation for services rendered and reimbursement of expenses incurred by Professionals from the Petition Date through the Effective Date shall be Filed no later than ninety (90) Days after the Effective Date or such later date as the Bankruptcy Court approves. Applications that are not timely Filed will not be considered by the Court. The Liquidation Trustee may pay any Professional fees and expenses incurred after the Effective Date without any application to the Bankruptcy Court.

CONFIRMATION REQUEST

The Debtors hereby request confirmation of the Plan pursuant to section 1129(a) or section 1129(b) of the Bankruptcy Code.

Dated: February 15, 2011

RADLAX GATEWAY HOTEL, LLC and RADLAX GATEWAY DECK, LLC

By: /s/ Timothy G. Franzen
Authorized Agent and Representative

RECORD
AND
BRIEFS

No. 11-166

JAN 2 2012
OFFICE OF THE CLERK

In the Supreme Court of the United States

RADLAX GATEWAY HOTEL, LLC
and RADLAX GATEWAY DECK, LLC,
Petitioners,

v.

AMALGAMATED BANK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT APPENDIX, Vol. 2 of 2

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Petition for Writ of Certiorari filed August 5, 2011
Petition for Writ of Certiorari granted December 12, 2011

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The following opinions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

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HOTEL ASSET PURCHASE AND SALE AGREEMENT

by and between

RADLAX GATEWAY HOTEL, LLC
and
RADLAX GATEWAY DECK, LLC,
AS SELLER

and

LAXCSH LLC,
AS PURCHASER

DATED AS OF FEBRUARY 15, 2011

RADISSON HOTEL AT
LOS ANGELES INTERNATIONAL AIRPORT
6225 West Century Boulevard
Los Angeles, California 90045

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HOTEL ASSET PURCHASE AND SALE AGREEMENT

THIS HOTEL ASSET PURCHASE AND SALE AGREEMENT (this "Agreement") is made and entered into as of this 15TH day of February, 2011 (the "Effective Date"), by and between RADLAX GATEWAY HOTEL, LLC, a Delaware limited liability company ("RADLAX HOTEL"), and RADLAX GATEWAY DECK, LLC, a Delaware limited liability company ("RADLAX DECK", RADLAX HOTEL and RADLAX DECK are sometimes referred to herein together as "Seller"), and LAXCSH LLC, a Delaware limited liability company ("Purchaser"). Seller and Purchaser are sometimes referred to herein individually as a "Party", and collectively as the "Parties".

RECITALS

WHEREAS, Seller is the owner of the Property (as defined herein) relating to the hotel facility having an address of 6225 West Century Boulevard, Los Angeles, California 90045, and commonly known as the Radisson Hotel at Los Angeles International Airport (the "Hotel"), and further relating to the partially constructed parking deck facility having an address of 6200 98th Street, Los Angeles, California 90045 (the "Parking Deck").

WHEREAS, Seller desires to sell the Property to Purchaser, and Purchaser desires to purchase the Property from Seller, on the terms set forth in this Agreement.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual covenants set forth in this Agreement and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Seller and Purchaser hereby agree as follows:

ARTICLE I
DEFINITIONS

Section 1.1 Definitions. In addition to the terms defined above in the introduction and recitals to this Agreement, the following terms when used in this Agreement shall have the meanings set forth in this Section 1.1.

"Accounts Receivable" means all amounts which Seller is entitled to receive from the operation of the

Hotel, but are not paid as of the date immediately preceding the Closing Date, including, without limitation, (i) charges for the use or occupancy of any guest, conference, meeting or banquet rooms or other facilities at the Hotel, any restaurant, bar or banquet services, or any other goods or services provided by or on behalf of Seller at the Hotel, but expressly excluding any credit card charges and checks which Seller has submitted for payment as of the Closing, and (ii) rents under the Tenant Leases.

"Accrued and Earned Vacation Pay" means all payments for accrued vacation or paid time off benefits which are vested and owed to the Employees as of the Cut-Off Time, and excluding any accrued, but unused, sick or personal day benefits.

"Affiliate" means, with respect to the Person in question, any other Person that, directly or indirectly, controls, is controlled by or is under common control with, such Person. For the purposes of this definition, the term "control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of the Person in question, whether by the ownership of voting securities, contract or otherwise.

"Applicable Law" means all statutes, laws, common law, rules, regulations, ordinances, codes or other legal requirements of any Governmental Authority, and quasi-governmental agencies or entities, and any judgment, injunction, order, directive, decree or other judicial or regulatory requirement of any court or Governmental Authority of competent jurisdiction affecting or relating to the Person or property in question.

"Asset Management Agreement" has the meaning set forth in Section 2.2(e) of this Agreement.

"Asset Manager" means Creative Hospitality Investment Consulting, LLC, an Illinois limited liability company.

"Assumed Contracts and Leases" has the meaning set forth in Section 4.3 of this Agreement.

"Attic Stock" has the meaning set forth in Section 2.1(d) of this Agreement.

"Auction & Bid Procedures Motion" means RADLAX HOTEL's and RADLAX DECK's Motion for an Order dated and filed with the Bankruptcy Court on June 4, 2010: (A) Approving Procedures for the Sale of Substantially All of the Debtors' Assets; (B) Scheduling an Auction; (C) Approving Assumption and Assignment Procedures; (D) Approving Form of Notice; and (E) Granting Related Relief.

"Bankruptcy Code" means the Bankruptcy Reform Act of 1978, as codified in title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.*, as in effect on the Petition Date, together with all amendments and modifications thereto that subsequently may be made applicable to the Chapter 11 Cases.

"Bankruptcy Contingencies" has the meaning set forth in Section 4.4 of this Agreement.

"Bankruptcy Deadlines" has the meaning set forth in Section 4.4 of this Agreement.

"Bankruptcy Court" means the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division or, if such court ceases to exercise jurisdiction over these proceedings, the court or adjunct thereof that exercises jurisdiction over the Chapter 11 Cases.

"Bankruptcy Rules" means: (a) the Federal Rules of Bankruptcy Procedure and the Official Bankruptcy Forms, as amended and promulgated under section 2075 of title 28 of the United States Code; (b) the Federal Rules of Civil Procedure, as amended and promulgated under section 2072 of title 28 of the United States Code; (c) any local rules applicable to the Bankruptcy Court; and (d) any standing orders governing practice and procedure issued by the Bankruptcy Court, each as in effect on the Petition Date, together with all amendments and modifications thereto that were subsequently made applicable to the Chapter 11 Cases or proceedings therein, as the case may be.

"Bid Deadline" has the meaning set forth in the Bid Procedures.

"Bid Procedures" means the procedures attached as Addendum 1 to the Bid Procedures Order.

"Bid Procedures Approval Contingency" has the meaning set forth in Section 4.4(a) of this Agreement.

"Bid Procedures Approval Date" has the meaning set forth in Section 4.1(a) of this Agreement.

"Bid Procedures Approval Deadline" has the meaning set forth in Section 4.4(a) of this Agreement.

"Bid Procedures Order" means an order of the Bankruptcy Court granting the Auction & Bid Procedures Motion and approving the Bid Procedures, in form and substance acceptable to Purchaser.

"Bookings" has the meaning set forth in Section 2.1(o) of this Agreement.

"Broker" means FBR Capital Markets & Co., Seller's financial advisor and investment banker retained by Seller pursuant to a Bankruptcy Court order entered in the Chapter 11 Cases on September 21, 2009.

"Business Day" means any day other than Saturday, Sunday or any Federal legal holiday.

"Casualty" has the meaning set forth in Section 13.1(a) of this Agreement.

"CBA" has the meaning set forth in Section 5.1(g)(i) of this Agreement.

"Chapter 11 Cases" means the cases under chapter 11 of the Bankruptcy Code commenced by RADLAX HOTEL and RADLAX DECK in the Bankruptcy Court on the Petition Date under case numbers 09-30047 and 09-30048, respectively.

"Closing" has the meaning set forth in Section 9.1 of this Agreement.

"Closing Date" has the meaning set forth in Section 9.1 of this Agreement.

"Closing Documents" has the meaning set forth in Section 9.2 of this Agreement.

"Closing Escrow" has the meaning set forth in Section 9.2 of this Agreement.

"Closing Escrow Agreement" has the meaning set forth in Section 9.2 of this Agreement.

"Compensation" means all salaries and wages which the Employees are entitled to receive at the time in question, together with all employment taxes with respect thereto, including, without limitation, any withholding or employer contributions under the Federal Insurance Contribution Act and Federal Unemployment Taxes Act, but expressly excluding all other compensation accrued or payable to the Employees, including, without limitation, any (i) bonus or incentive compensation (except to the extent such bonus or incentive compensation would be deemed under Applicable Law to be earned and payable to the Employees as of the Closing Date); (ii) accrued and earned vacation days, sick days and personal days; and (iii) any health, welfare and other benefits provided to the Employees under the Seller Employee Plans, and employer contributions to, and amounts paid or accrued under, the Seller Employee Plans for the benefit of the Employees.

"Condemnation" has the meaning set forth in Section 13.2(a) of this Agreement.

"Confidential Information" has the meaning set forth in Section 7.1(a) of this Agreement.

"Confirmation Hearing" means the hearing held before the Bankruptcy Court to consider confirmation of the Joint Chapter 11 Plan pursuant to sections 1128 and 1129 of the Bankruptcy Code

"Confirmation Order" means an order entered by the Bankruptcy Court, in form and substance acceptable to Purchaser, confirming the Joint Chapter 11 Plan pursuant to section 1129 of the Bankruptcy Code and, among other things, (x) approving Seller's sale of the Property pursuant to this Agreement to Purchaser free and clear of all liens, claims (including but not limited to successor liability or similar claims), charges, security interests, restrictions and other encumbrances or interests of any kind or nature thereon and there against, (y) finding that Purchaser purchased the Property from Seller in good faith, and (z) providing that, pursuant to the fullest extent permitted by section 1146 of the Bankruptcy Code, the transaction contemplated by this Agreement shall not be taxed under any state or local law imposing a stamp tax, transfer tax or similar tax or fee.

"Contracts" means, collectively, the Equipment Leases and Operating Agreements.

"Cut-Off Time" has the meaning set forth in Section 10.1 of this Agreement.

"Disclosure Statement" has the meaning ascribed it in the Joint Chapter 11 Plan.

"Disclosure Statement Approval Contingency" has the meaning set forth in Section 4.4 of this Agreement.

"Disclosure Statement Approval Deadline" has the meaning set forth in Section 4.4 of this Agreement.

"Disclosure Statement Approval Order" means an order of the Bankruptcy Court approving the Disclosure Statement, in form and substance acceptable to Purchaser.

"Due Diligence Contingency" has the meaning set forth in Section 4.1(a) of this Agreement.

"Due Diligence Period" has the meaning set forth in Section 4.1(a) of this Agreement.

"Earnest Money" has the meaning set forth in Section 3.3(a) of this Agreement.

"Earnest Money Escrow" has the meaning set forth in Section 3.3(a) of this Agreement.

"Earnest Money Escrow Agreement" has the meaning set forth in Section 3.3(a) of this Agreement.

"Effective Date" has the meaning set forth in the caption paragraph of this Agreement.

"Employees" means all individuals employed in regular full-time, regular part-time, and on-call job positions at the Hotel at the time in question, and specifically excluding any temporary employees and independent contractors.

"Employer" means Manager or any of its Affiliates which employs the Employees.

"Employment Agreements" has the meaning set forth in Section 5.1(g)(i) of this Agreement.

"Environmental Claims" means all claims for reimbursement or remediation expense, contribution, personal injury, property damage or damage to natural resources made by any Governmental Authority or other Person arising from or in connection with the presence or release of any Hazardous Materials over, on, in or under the Real Property, or the violation of any Environmental Laws with respect to the Real Property.

"Environmental Laws" means any Applicable Laws regulating or relating to any Hazardous Materials including, without limitation, (i) the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 et seq. ("CERCLA"), (ii) the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq. ("RCRA"), (iii) the Federal Water Pollution Control Act, 33 U.S.C. § 2601 et seq., (iv) the Toxic Substances Control Act, 15 U.S.C. § 2601 et seq., (v) the Clean Water Act, 33 U.S.C. § 1251 et seq., (vi) the Clean Air Act, 42 U.S.C. § 7401 et seq., (vii) the Hazardous Materials Transportation Act, 49 U.S.C. § 5101 et seq., (viii) the Safe Drinking Water Act, 42 U.S.C. § 803 et seq., (ix) the Oil Pollution Act of 1990, 33 U.S.C. § 2701 et seq., (x) the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11001 et seq., (xi) the Occupational Safety and Health Act, 29 U.S.C. § 651 et seq. (to the extent it regulates exposure to Hazardous Materials), and similar state and local Applicable Law, as amended from time to time, and all regulations, rules and guidance issued pursuant thereto.

"Environmental Liabilities" means all liabilities or obligations of any kind or nature imposed on the Person in question pursuant to any Environmental Laws, including, without limitation, any (i) obligations to manage, control, contain, remove, remedy, respond to, clean up or abate any actual or potential release of Hazardous Materials or other pollution or contamination of any water, soil, sediment, air or other environmental media, whether or not located on the Real Property and whether or not arising from the operations or activities with respect to the Hotel or the Parking Deck, and (ii) liabilities or obligations with respect to the manufacture, generation, formulation, processing, use, treatment, handling, storage, disposal, distribution or transportation of any Hazardous Materials.

"Environmental Reports" has the meaning set forth in Section 5.1(h) of this Agreement.

"Equipment Leases" has the meaning set forth in Section 2.1(j) of this Agreement.

"ERISA" means the Employee Retirement Income Security Act of 1974, as amended from time to time, and any regulations, rulings and guidance issued pursuant thereto.

"Escrow Agent" shall mean the Title Company.

"Excluded Property" has the meaning set forth in Section 2.2 of this Agreement.

"Failure to Cure Notice" has the meaning set forth in Section 4.2(d) of this Agreement.

"Final Order" has the meaning ascribed it in the Joint Chapter 11 Plan.

"Financial Information" has the meaning set forth in Section 5.1(p) of this Agreement.

"F&B" has the meaning set forth in Section 2.1(f) of this Agreement.

"FF&E" has the meaning set forth in Section 2.1(c) of this Agreement.

"Franchise Agreement" has the meaning set forth in Section 2.2(c) of this Agreement.

"Franchisor" has the meaning set forth in Section 2.2(c) of this Agreement.

"Governmental Authority" means any federal, state or local government or other political subdivision thereof, including, without limitation, any agency or entity exercising executive, legislative, judicial, regulatory or administrative governmental powers or functions, in each case to the extent the same has jurisdiction over the Person or property in question, including, without limitation, the Bankruptcy Court.

"Guest Ledger" means any and all charges accrued to the open accounts of any guests or customers at the Hotel as of the Cut-Off Time for the use and occupancy of any guest, conference, meeting or banquet rooms or other facilities at the Hotel, any restaurant, bar or banquet services, or any other goods or services provided by or on behalf of Seller.

"Hazardous Materials" means any hazardous or toxic substances, materials or waste, whether solid, semisolid, liquid or gaseous, including, without limitation, asbestos, polychlorinated biphenyls, petroleum or petroleum by-products, (excluding any substances of kinds and amounts ordinarily used or stored in similar properties for purposes of cleaning or other maintenance or operations and otherwise in compliance with all Environmental Laws) and any other material or substance which is defined as a "hazardous substance", "hazardous waste", "toxic waste" or "toxic substance" under any Environmental Laws.

"Hotel" has the meaning set forth in the first Recital of this Agreement.

"Improvements" has the meaning set forth in Section 2.1(b) of this Agreement.

"Indemnification Cap" has the meaning set forth in Section 14.3(b) of this Agreement.

"Indemnification Claim" has the meaning set forth in Section 14.4(a) of this Agreement.

"Indemnitee" has the meaning set forth in Section 14.4(a) of this Agreement.

"Indemnitor" has the meaning set forth in Section 14.4(a) of this Agreement.

"Inspections" has the meaning set forth in Section 4.1(b) of this Agreement.

"Intangible Property" has the meaning set forth in Section 2.1(m) of this Agreement.

"Inventoried Baggage" has the meaning set forth in Section 11.2 of this Agreement.

"Inventoried Safe Deposit Boxes" has the meaning set forth in Section 11.1 of this Agreement.

"Joint Chapter 11 Plan" means the RADLAX HOTEL's and RADLAX DECK's Second Amended Joint Chapter 11 Plan dated as of February 15, 2011, including all exhibits, appendices, schedules and annexes, if any, attached thereto, as submitted by RADLAX HOTEL and RADLAX DECK, including the supplement to the Joint Chapter 11 Plan to be filed with the Bankruptcy Court on or before the date that is five (5) days prior to the Confirmation Hearing, as such Joint Chapter 11 Plan may be altered, amended, supplemented or modified from time to time in accordance with the provisions of the Bankruptcy Code, the Bankruptcy Rules, the Confirmation Order and the terms and conditions of Section 12.04 of the Joint Chapter 11 Plan.

"Knowledge" means (i) with respect to Seller, the actual knowledge of Seller, and, Manager or any of their respective Affiliates, and (ii) with respect to Purchaser, (A) the actual knowledge of Purchaser, (B) any matter disclosed in any exhibits or schedules to this Agreement, (C) any matter disclosed by Seller in a letter to Purchaser prior to Closing, (D) any matter disclosed in the Purchaser Due Diligence Reports, and (E) any matter disclosed by Seller pursuant to an amendment to Seller's representations,

warranties or schedules in accordance with Section 5.3 of this Agreement.

"Land" has the meaning set forth in Section 2.1(a) of this Agreement.

"Licenses and Permits" has the meaning set forth in Section 2.1(l) of this Agreement.

"Liquidating Trust" means the trust to be established in accordance with the Joint Chapter 11 Plan.

"Liquidation Trustee" means the trustee of the Liquidating Trust.

"Liquor License" has the meaning set forth in Section 7.3 of this Agreement.

"Losses" means, with respect to the Person in question, any liability, damage, loss, cost or expense, including, without limitation, reasonable attorneys fees and expenses and court costs, incurred by such Person.

"Management Agreement" has the meaning set forth in Section 2.2(d) of this Agreement.

"Manager" means Portfolio LAX, LLC, an Illinois limited liability company.

"Material Casualty" has the meaning set forth in Section 13.1(a) of this Agreement.

"Material Condemnation" has the meaning set forth in Section 13.2(a) of this Agreement.

"Material Contract" means any Contract requiring aggregate annual payments in excess of Ten Thousand Dollars ($10,000) for any year during the term of such Contract, or any Contract which is not terminable by Seller upon thirty (30) or fewer days notice without the payment of early termination fees or penalties.

"Non-Inventoried Safe Deposit Boxes" has the meaning set forth in Section 11.1 of this Agreement.

"Notice" has the meaning set forth in Section 15.1(a) of this Agreement.

"Operating Agreements" has the meaning set forth in Section 2.1(k) of this Agreement.

"Ordinary Course of Business" means the ordinary course of business consistent with Seller's past custom and practices for the operation, maintenance and repair of the Hotel.

"Parking Deck" has the meaning set forth in the first Recital of this Agreement.

"Permitted Exceptions" has the meaning set forth in Section 4.2(c) of this Agreement.

"Person" means any natural person, corporation, general or limited partnership, limited liability company, association, joint venture, trust, estate, Governmental Authority or other legal entity, in each case whether in its own or a representative capacity.

"Personal Property" means the Property other than the Real Property.

"Petition Date" means August 17, 2009, the date on which RADLAX HOTEL and RADLAX DECK filed their respective petitions for relief under the Bankruptcy Code commencing the Chapter 11 Cases.

"Plan Confirmation Contingency" has the meaning set forth in Section 4.4 of this Agreement.

"Plan Confirmation Deadline" has the meaning set forth in Section 4.4 of this Agreement.

"Plan Effective Date Contingency" has the meaning set forth in Section 4.4 of this Agreement.

"Plan Effective Date Deadline" has the meaning set forth in Section 4.4 of this Agreement.

"Property" has the meaning set forth in Section 2.1 of this Agreement.

"Prorations" has the meaning set forth in Section 10.1 of this Agreement.

"Purchase Price" has the meaning set forth in Section 3.1 of this Agreement.

"Purchaser Closing Conditions" has the meaning set forth in Section 8.2 of this Agreement.

"Purchaser Default" has the meaning set forth in Section 12.2 of this Agreement.

"Purchaser Due Diligence Reports" has the meaning set forth in Section 4.1(d) of this Agreement.

"Purchaser Indemnitees" means Purchaser and its Affiliates, and each of their respective shareholders, members, partners, trustees, directors, officers, employees and agents, and the successors, assigns, heirs and legal representatives of each of the foregoing.

"Purchaser's Inspectors" has the meaning set forth in Section 4.1(b) of this Agreement.

"Real Property" has the meaning set forth in Section 2.1(b) of this Agreement.

"Retail Merchandise" has the meaning set forth in Section 2.1(g) of this Agreement.

"Seller Closing Conditions" has the meaning set forth in Section 8.3 of this Agreement.

"Seller Default" has the meaning set forth in Section 12.1 of this Agreement.

"Seller Due Diligence Materials" has the meaning set forth in Section 4.1(c) of this Agreement.

"Seller Employee Plans" means each employee benefit plan, policy or arrangement, whether or not written, that is sponsored, maintained or contributed to by or on behalf of Seller or Manager or any of their Affiliates and that provides (i) any pension, retirement, profit sharing or deferred or incentive compensation, or (ii) any health, medical or welfare benefits, in each case, for the benefit of any Employees and/or their spouses, dependents or other qualified beneficiaries.

"Seller Indemnitees" means Seller, Manager, Employer and their respective Affiliates, and each of their respective shareholders, members, partners, trustees, directors, officers, employees and agents, and the successors, assigns, heirs and legal representatives of each of the foregoing.

"Seller's Possession" means in the actual possession of any officer or employee of Seller; provided, however, that any reference in this Agreement to Seller's Possession of any documents or materials expressly excludes the possession of any such documents or materials that are legally privileged or constitute attorney work product.

"Settlement Statement" has the meaning set forth in Section 10.3 of this Agreement.

"Supplies" has the meaning set forth in Section 2.1(e) of this Agreement.

"Survey" has the meaning set forth in Section 4.2(b) of this Agreement.

"Survey Defects" has the meaning set forth in Section 4.2(c) of this Agreement.

"Survival Period" has the meaning set forth in Section 14.3(a) of this Agreement.

"Tax Code" means the Internal Revenue Code of 1986, as amended from time to time, and any regulations, rulings and guidance issued by the Internal Revenue Service.

"Taxes" means any federal, state, local or foreign, real property, personal property, sales, use, room, occupancy, excise, severance, stamp, payroll, employment, withholding, social security, unemployment, disability, vault, ad valorem, assessments, value added or other tax, assessments, levies, charges or fees of any kind whatsoever imposed on Seller or the Property or any portion thereof by any Governmental Authority, including, without limitation, any interest, penalty, or addition thereto, but expressly excluding any (i) federal, state, local or foreign income, capital gain, gross receipts, capital stock, franchise, profits, estate or gift tax, or (ii) transfer or similar taxes incurred with respect to the transaction contemplated in this Agreement.

"Tenant Leases" has the meaning set forth in Section 2.1(i) of this Agreement.

"Terminated Contract" has the meaning set forth in Section 4.3 of this Agreement.

"Third-Party Claim" means, with respect to the Person in question, any claim, demand, lawsuit, arbitration or other legal or administrative action or proceeding against such Person by any other Person which is not an Affiliate of such Person.

"Title Commitment" has the meaning set forth in Section 4.2(a) of this Agreement.

"Title Company" means First American Title Insurance Company, National Commercial Services Division, Chicago, Illinois.

"Title Exceptions" has the meaning set forth in Section 4.2(c) of this Agreement.

"Title Objection Letter" has the meaning set forth in Section 4.2(c) of this Agreement.

"Title Policy" has the meaning set forth in Section 8.2(d) of this Agreement.

"Trade Payables" has the meaning set forth in Section 10.1(l) of this Agreement.

"Unpermitted Exceptions" has the meaning set forth in Section 4.2(c) of this Agreement.

"WARN Act" means the Worker's Adjustment and Retraining Notification Act of 1988, 29 U.S.C. § 2101, et seq., and any similar state and local Applicable Law, as amended from time to time, and any regulations, rules and guidance issued pursuant thereto.

ARTICLE II
DESCRIPTION OF THE PROPERTY; EXCLUDED PROPERTY

Section 2.1 Description of the Property. Subject to the terms set forth in this Agreement, at the Closing, Seller shall sell, convey, transfer, assign and deliver to Purchaser, and Purchaser shall purchase and accept from Seller, all right, title and interest of Seller in and to the property and assets set forth in this Section 2.1, but expressly excluding the Excluded Property (collectively, the "Property"):

(a) Land. The land described in Schedule 2.1(a), together with all appurtenant easements and any

other rights and interests appurtenant thereto (the "Land");

(b) Improvements. All buildings, structures and improvements located on, under or affixed to the Land and all fixtures on the Land which constitute real property under Applicable Law (the "Improvements"; the Land and the Improvements are referred to collectively herein as the "Real Property");

(c) FF&E. All fixtures (other than those which constitute Improvements), furniture, furnishings, equipment, machinery, vehicles, appliances, computer hardware, art work and other items of tangible personal property which are located at the Hotel and used exclusively in the operation of the Hotel, or ordered for future use at the Hotel as of the Closing, other than the Supplies, the F&B and the Retail Merchandise (the "FF&E");

(d) Attic Stock. Subject to Section 10.1(n) of this Agreement, all FF&E in storage intended as replacement FF&E (the "Attic Stock");

(e) Supplies. Subject to Section 10.1(n) of this Agreement, all china, glassware, silverware; all linens; all uniforms; all engineering, maintenance, cleaning and housekeeping supplies; all matches and ashtrays; all soap and other toiletries; all stationery, menus and other printed materials; and all other similar materials and supplies, which are located at the Hotel or ordered for future use at the Hotel as of the Closing (the "Supplies");

(f) Food and Beverage. Subject to Section 10.1(i) of this Agreement, all food and beverages which are

located at the Hotel (whether opened or unopened), or ordered for future use at the Hotel as of the Closing, but expressly excluding any alcoholic beverages to the extent the sale or transfer of the same is not permitted under Applicable Law (the "F&B");

(g) Retail Merchandise. Subject to Section 10.1(i) of this Agreement, all merchandise located at the Hotel, including, without limitation, any gift shop, pro shop or newsstand maintained by Seller or Manager, and held for sale to guests and customers of the Hotel, or ordered for future sale at the Hotel as of the Closing (the "Retail Merchandise");

(h) Intentionally omitted;

(i) Tenant Leases. All leases, subleases, licenses, concessions and similar agreements granting a real property interest to any other Person for the use or occupancy of any portion of the Real Property which are listed and described in Schedule 2.1(i) (the "Tenant Leases"), other than the Franchise Agreement, the Management Agreement and the Bookings, together with all security deposits held by Seller thereunder, to the extent such Tenant Leases and security deposits are transferable;

(j) Equipment Leases. All leases and purchase money security agreements for any equipment, machinery, vehicles, furniture or other personal property located at the Hotel and used in the operation of the Hotel which are listed in Schedule 2.1(j) (the "Equipment Leases"), other than the items identified as "Terminated Contracts" in Schedule 4.3, together with all deposits made thereunder, to the extent such Equipment Leases and deposits are transferable;

(k) Operating Agreements. All maintenance, service and supply contracts, credit card service agreements, and all other contracts and agreements which are held by or on behalf of Seller in connection with the operation of the Hotel which are listed in Schedule 2.1(k) (the "Operating Agreements"), other than the Tenant Leases, the Equipment Leases, the Licenses and Permits and the items identified as "Terminated Contracts" on Schedule 4.3, together with all deposits made or held by Seller thereunder, to the extent such Operating Agreements and deposits are transferable;

(l) Licenses and Permits. All licenses, permits, consents, authorizations, approvals, registrations and certificates of any Governmental Authority held by Seller and used in connection with the construction, ownership, occupancy or operation of the Hotel and the Parking Deck which are listed in Schedule 2.1(l) (the "Licenses and Permits"), excluding the Liquor License, together with any deposits made by Seller thereunder, to the extent such Licenses and Permits and deposits are transferable;

(m) Intangible Property. All of the following owned by, issued to or licensed to Seller and used in connection with the operation of the Hotel or the Parking Deck to the extent Seller's rights and interests therein are transferable: (i) warranties and guaranties held by Seller pursuant to any Contracts or with respect to any Improvements or Personal Property; (ii) computer software used in connection with any computer systems located at the Hotel, including all websites and e-mail addresses that are specific only to the Hotel and are not Excluded Property; (iii) all trademarks, trade names, service marks, symbols,

logos and other intellectual property rights, if any, but specifically excluding any of the foregoing related to the names Radisson® Hotels & Resorts or goldpoints plus℠; and (iv) the good will, trade custom and going concern value of the Property (collectively, the "Intangible Property");

(n) Telephone Numbers. Any and all direct dial telephone numbers for the Hotel;

(o) Bookings. All bookings and reservations for guest, conference, meeting and banquet rooms or other facilities at the Hotel that are made before the Closing Date (the "Bookings"), together with all deposits held by Seller with respect thereto and any and all records related thereto that are necessary to honor such bookings in accordance with the terms of this Agreement; and

(p) Accounts Receivable. All Accounts Receivable (including the Guest Ledger) as set forth in Section 10.2.

Section 2.2 Excluded Property. Notwithstanding anything to the contrary in Section 2.1, the property, assets, rights and interests set forth in this Section 2.2 (the "Excluded Property") are excluded from the Property:

(a) Cash. Subject to Section 10.1(m) and except for deposits expressly included in Section 2.1, all cash in any operating or payroll bank accounts or other bank accounts maintained in connection with the ownership or operation of the Hotel;

(b) Third-Party Property. Any fixtures or personal property owned by (i) the lessor under any Equipment Leases, (ii) the supplier or vendor under any other Contracts, (iii) the tenant under any Tenant Leases, (iv) the Manager, (v) any Employees, or (vi) any guests or customers of the Hotel;

(c) Franchise Agreement. That certain License Agreement, by and between Radisson Hotels International, Inc. ("Franchisor") and RADLAX HOTEL, dated November 20, 2007 and effective as of November 1, 2007 (the "Franchise Agreement"), which shall be terminated by RADLAX HOTEL at the Closing;

(d) Management Agreement. That certain Management Agreement, by and between RADLAX HOTEL and Manager, dated as of November 1, 2007 (the "Management Agreement"), which shall be terminated by RADLAX HOTEL at the Closing;

(e) Asset Management Agreement. That certain Advisory Services Agreement, by and between RADLAX HOTEL and Asset Manager, dated as of October 31, 2007 (the "Asset Management Agreement"), which shall be terminated by RADLAX HOTEL at or prior to the Closing;

(f) Insurance. Seller's insurance relating to the Hotel and the Parking Deck, which shall be terminated by Seller as of the Closing;

(g) Terminated Contracts. All Contracts identified as "Terminated Contracts" on Schedule 4.3; and

(h) Seller Employee Plans; Employee Records. All Seller Employee Plans identified on Schedule 5.1(g) and any and all employment files and records maintained by Seller or Manager pertaining to the Employees.

ARTICLE III
PURCHASE PRICE; EARNEST MONEY

Section 3.1 Purchase Price. The purchase price for the Property is **FIFTY-FIVE MILLION** and no/100 Dollars ($55,000,000.00) (the "Purchase Price"), which shall be adjusted at the Closing for the Prorations and the Accounts Receivable pursuant to Sections 10.1 and 10.2 respectively.

Section 3.2 Allocation of Purchase Price. Seller and Purchaser hereby agree that the Purchase Price shall be allocated among the Land, Improvements and Personal Property as set forth in Schedule 3.2 for federal, state and local tax purposes. Seller and Purchaser acknowledge and agree that the allocation set forth in Schedule 3.2 represents an arm's length agreement based on the Parties' best judgment as to the fair market value of the Property. Seller and Purchaser shall file all federal, state and local tax returns, in accordance with the allocation set forth in Schedule 3.2, as the same may be adjusted pursuant to Sections 10.1 and 10.2. This Section 3.2 shall survive the Closing.

Section 3.3 Earnest Money.

(a) Earnest Money. Purchaser shall, within two (2) Business Days after the Bid Procedures Approval Date (as hereinafter defined), deposit with Escrow

Agent the sum of TWO MILLION SEVEN HUNDRED FIFTY THOUSAND AND NO/100 DOLLARS ($2,750,000.00) (the "Earnest Money"). The Earnest Money shall be non-refundable to Purchaser, except as otherwise expressly provided in this Agreement. The Earnest Money shall be held by Escrow Agent in escrow (the "Earnest Money Escrow") pursuant to the escrow agreement in the strict joint order escrow form attached hereto as Exhibit A, to be entered into among Seller, Purchaser and Escrow Agent (the "Earnest Money Escrow Agreement"), and delivered to Escrow Agent concurrently with the Earnest Money.

(b) Investment of Earnest Money. The Earnest Money shall be invested in any investments approved by Seller and Purchaser in writing in accordance with the Earnest Money Escrow Agreement, and all interest and other amounts earned on the Earnest Money shall be deemed additional Earnest Money. All fees, costs and expenses of the Earnest Money Escrow shall be shared equally between Seller and Purchaser, except that Purchaser shall pay any fees, costs or expenses with respect to the investment of the Earnest Money and Purchaser shall bear the risk of loss of the Earnest Money.

(c) Disbursement of Earnest Money. At the Closing, Purchaser shall cause Escrow Agent to disburse the Earnest Money to the Liquidating Trust, and Purchaser shall receive a credit against the Purchase Price in the amount of the Earnest Money disbursed to the Liquidating Trust, or if this Agreement is terminated, the Earnest Money shall be disbursed by Escrow Agent to Seller or Purchaser in accordance with the terms of this Agreement and the Earnest Money Escrow Agreement.

Section 3.4 Payment of Purchase Price. At the Closing, Purchaser shall pay to the Liquidating Trust by wire transfer of immediately available funds an amount equal to the Purchase Price, plus or minus the Prorations (as the case may be) pursuant to Section 10.1, plus Accounts Receivable pursuant to Section 10.2, and less the Earnest Money disbursed to Seller.

ARTICLE IV
DUE DILIGENCE; TITLE AND SURVEY; CONTINGENCIES

Section 4.1 Due Diligence.

(a) Due Diligence Contingency. Purchaser shall have a period from the date on which the Bid Procedures Order becomes a Final Order (the "Bid Procedures Approval Date") until 6:00 p.m. (Central Time) on the date thirty (30) days after the Bid Procedures Approval Date (the "Due Diligence Period"), to perform its due diligence review of the Property and all matters related thereto which Purchaser deems advisable, including, without limitation, with respect to engineering, environmental, title, survey, financial, operational and legal compliance matters. If Purchaser, in its sole discretion, is not satisfied with the results of its due diligence review for any reason whatsoever, Purchaser shall have the right to terminate this Agreement by providing written notice to Seller and Escrow Agent prior to the expiration of the Due Diligence Period (the "Due Diligence Contingency"). If Purchaser terminates this Agreement pursuant to the Due Diligence Contingency prior to the expiration of the Due Diligence Period, Escrow Agent shall refund the Earnest Money to Purchaser, and Seller and

Purchaser shall have no further rights or obligations under this Agreement, except those which expressly survive such termination. If Purchaser does not terminate this Agreement pursuant to the Due Diligence Contingency prior to the expiration of the Due Diligence Period in accordance with this Section 4.1(a), Purchaser shall be deemed to have waived its rights to terminate this Agreement pursuant to the Due Diligence Contingency, in which case the Earnest Money shall be non-refundable to Purchaser, except as otherwise expressly provided in this Agreement.

(b) Due Diligence Inspections. Purchaser, through its employees, agents and representatives ("Purchaser's Inspectors"), shall have the right to perform such examinations, tests, investigations and studies of the Property (the "Inspections") as Purchaser reasonably deems advisable, in accordance with this Section 4.1, and Seller shall provide reasonable access to the Property for Purchaser's Inspectors to perform the Inspections from the Effective Date until the Closing; provided, however, that (i) Purchaser shall provide Seller with at least one (1) Business Day prior written notice of each of the Inspections; (ii) Purchaser and its inspectors shall be accompanied by an employee, agent or representative of Seller; (iii) the Inspections shall be conducted by Purchaser's Inspectors on a Business Day between 9:00 a.m. and 5:00 p.m. (Central Time); (iv) Purchaser's Inspectors shall not perform any drilling, coring or other invasive testing, without Seller's prior written consent (which consent may be withheld in Seller's sole discretion) and (v) the Inspections shall not unreasonably interfere with the operations of the Hotel, and Purchaser's Inspectors

shall comply with Seller's requests with respect to the Inspections to minimize such interference.

(c) Seller's Due Diligence Materials. Purchaser acknowledges receipt of the due diligence materials set forth on Schedule 4.1(c). Seller shall provide to Purchaser promptly upon request by Purchaser such additional due diligence materials in Seller's Possession relating to the Property which are reasonably requested by Purchaser, and Purchaser agrees to acknowledge in writing, upon Seller's request, the receipt of any due diligence documents or materials delivered to Purchaser. (All due diligence documents and materials provided by Seller to Purchaser pursuant to this Agreement are referred to collectively herein as the "Seller Due Diligence Materials".)

(d) Purchaser's Due Diligence Reports. If requested by Seller, Purchaser shall provide a copy to Seller of all studies, reports, and assessments prepared by any Person for or on behalf of Purchaser (other than any internal studies, reports and assessments prepared by any of Purchaser's employees, attorneys, investors, bankers or accountants) in connection with the Inspections (the "Purchaser Due Diligence Reports"), and if also requested by Seller, at Seller's cost and expense, Purchaser shall use commercially reasonable efforts to obtain an original of any such Purchaser Due Diligence Reports for Seller, together with a reliance letter from such Person in favor of Seller. This Section 4.1(d) shall survive the termination of this Agreement and the Closing.

(e) Release and Indemnification. Purchaser shall, at its cost and expense, repair any damage to the Property or any other property owned by a Person other than Purchaser arising from or in connection with the Inspections, and restore the Property or such other third-party property to the same condition as existed prior to such Inspections. Purchaser hereby releases the Seller Indemnitees for any Losses incurred by any Purchaser Indemnitees arising from or in connection with the Inspections, except to the extent resulting from Seller's negligence or intentional misconduct. Purchaser shall indemnify the Seller Indemnitees from and against any Losses incurred by any Seller Indemnitees arising from or in connection with the Inspections. Purchaser shall in no event be responsible under this Section 4(e) for any condition already existing on the Property at the time of the Inspections, except and only to the extent that Purchaser or the Inspections exacerbate such existing condition. This Section 4.1(e) shall survive the termination of this Agreement and the Closing.

(f) Liens. Purchaser shall not permit any mechanics' or materialmen's liens to be filed against the Real Property as a result of the Inspection or of any of Purchaser's Inspectors activities on or with respect to the Real Property, including but not limited to, with respect to any labor or materials furnished to the Real Property at Purchaser's or Purchaser's Inspectors' insistence or request. If any such lien is filed against the Real Property, Purchaser shall cause the same to be promptly discharged of record and, to the extent not fully discharged of record, any such lien shall be a Permitted Exception to which the Purchaser agrees to accept the conveyance of title to the Real Property for the purposes of this Agreement. If

Purchaser fails to have any such lien removed of record or post a bond or other security acceptable to Seller within thirty (30) days following written notice from Seller, then Seller may cause the same to be removed of record and recover from Purchaser all out-of-pocket costs and expenses incurred by Seller in connection therewith. Purchaser shall indemnify, hold harmless and defend Seller, Manager and the Real Property from and against any and all such liens. This Section 4.1(f) shall survive the termination of this Agreement.

(g) Compliance with Laws. Purchaser, at its own expense, shall comply (and shall cause each of Purchaser's Inspectors to comply) with all applicable laws, regulations, rules, and orders with respect to the Inspections and with respect to their activities on or about the Real Property including, without limitation, those relating to health, safety, noise, environmental protection, waste disposal, water and air quality, and worker occupational health and safety, and shall furnish to Seller reasonable evidence of such compliance upon request.

(h) Insurance.

(i) With respect to any activities on or about the Real Property, Purchaser shall, at its expense, maintain and furnish or cause Purchaser's Inspectors to maintain and furnish evidence of insurance naming RADLAX HOTEL, RADLAX DECK, Manager and Portfolio Hotels & Resorts, LLC as additional insureds thereunder, written through an insurance company licensed to do business in the state in which the Real Property is located having a rating of at least "A" by A.M.

Best Company, evidencing current worker's compensation insurance meeting the legally mandated limits of coverage as well as commercial general liability insurance on an occurrence basis with coverage limits of not less than Two Million Dollars ($2,000,000) combined single limit per occurrence for personal liability (including bodily injury and death) and not less than One Million Dollars ($1,000,000) per occurrence for property damage and with endorsements (copies to be provided to Seller) providing that such coverages are primary and evidencing contractual liability insurance that covers Purchaser's indemnity obligations under this Agreement.

(ii) A properly completed certificate of insurance executed by an authorized representative of the insurer or insurers or a certified copy of the policy or policies, evidencing compliance with the above requirements and providing that not less than thirty (30) days prior written notice will be provided to Seller before any cancellation of coverage, shall be delivered to Seller prior to entry upon the Real Property by Purchaser or any of Purchaser's Inspectors. In any event, Purchaser shall cause RADLAX HOTEL, RADLAX DECK, Manager and Portfolio Hotels & Resorts, LLC to be named as additional insureds under all insurance coverages afforded Purchaser by any and all of Purchaser's Inspectors with respect to the performance of the Inspections.

(i) Natural Hazard Disclosure. Prior to the date which is five (5) Business Days before the expiration of the Due Diligence Period, Seller shall provide Purchaser with a natural hazard disclosure statement

as set forth in California Civil Code Section 1103.2. Purchaser acknowledges that Seller has engaged or will cause the Title Company to engage the services of a natural hazard disclosure expert to examine the maps and other information made available to the public by government agencies for the purpose of enabling Seller to fulfill its disclosure obligations and to prepare a written report of the result of its examination.

Section 4.2 Title and Survey.

(a) Title Commitment. Purchaser acknowledges receipt of an ALTA owner's title insurance commitment from the Title Company with an effective date of March 17, 2010 for the Real Property, together with a copy of all documents referenced therein (the "Title Commitment").

(b) Survey. Purchaser acknowledges receipt of the ALTA/ACSM Land Title Survey, prepared by PSOMAS, dated August 22, 2007 and updated on May 28, 2010 (the "Survey").

(c) Identification of Unpermitted Exceptions. If (i) the Title Commitment discloses any exceptions to title (each a "Title Exception"; collectively, the "Title Exceptions"), that are not acceptable to Purchaser, or (ii) the Survey discloses any encroachments by improvements on adjoining properties onto or over the Land, any encroachments of the Improvements onto or over adjoining properties, setback lines or easements (to the extent in violation thereof) or other survey defects (each a "Survey Defect"; collectively, the "Survey Defects"), that are not acceptable to Purchaser, Purchaser shall provide written notice to

Seller of Purchaser's objections to any unacceptable Title Exceptions and/or Survey Defects (the "Title Objection Letter") promptly after determining that such matters are not acceptable, but in no event later than ten (10) Business Days prior to expiration of the Due Diligence Period. The Title Exceptions and Survey Defects set forth in any Title Objection Letter are referred to collectively herein as the "Unpermitted Exceptions". The term "Unpermitted Exceptions" shall include any and all mechanics liens or mortgages encumbering the Real Property whether or not disclosed in the Title Commitment and whether or not objected to by Purchaser in the Title Objection Letter. All (i) real estate taxes and assessments not due and payable as of the Closing Date, (ii) Title Exceptions disclosed in the Title Commitment and all matters disclosed on the Survey, that are not objected to by Purchaser in any Title Objection Letter, (iii) all Tenant Leases, and (iv) all liens and encumbrances created by Purchaser are referred to collectively herein as the "Permitted Exceptions". If Purchaser does not provide a Title Objection Letter to Seller at least ten (10) Business Days prior to the expiration of the Due Diligence Period, Purchaser shall be deemed to have waived all objections to any Title Exceptions and all Survey Defects, in which case all such Title Exceptions and Survey Defects shall be deemed Permitted Exceptions, except that all mechanics liens and mortgages encumbering the Real Property shall be Unpermitted Exceptions regardless of whether Purchaser delivers a Title Objection Letter.

(d) Removal of Unpermitted Exceptions. Seller shall have no obligation to cure any Unpermitted Exceptions, except for exceptions relating to Seller's financing and for exceptions curable by an

ascertainable sum of money (which Seller shall pay off or otherwise cure at or prior to the Closing in a manner sufficient to remove said exceptions from the Title Policy). Seller may cure any Unpermitted Exceptions by removing such Unpermitted Exception from title or causing the Title Company to waive or commit to insure over such Unpermitted Exception at any time prior to the Closing. If Seller (i) elects not to cure any Unpermitted Exception(s) or (ii) determines in its sole discretion that it will not be able to cure any Unpermitted Exception(s) prior to the Closing, Seller shall provide written notice to Purchaser of any such uncured Unpermitted Exception(s) (the "Failure to Cure Notice") at any time prior to the Closing, in which case Purchaser shall have the option, to be exercised by delivery of written notice to Seller within five (5) Business Days after delivery of the Failure to Cure Notice, to (A) terminate this Agreement, in which case Escrow Agent shall promptly refund the Earnest Money to Purchaser and Seller and Purchaser shall have no further rights or obligations under this Agreement, except those which expressly survive such termination, or (B) proceed to the Closing under this Agreement and accept title to the Real Property, subject to such uncured Unpermitted Exception(s) (which shall thereafter be deemed to be Permitted Exceptions), without any credit against the Purchase Price for any such uncured Unpermitted Exception(s). If Purchaser does not terminate this Agreement under clause (A) of the preceding sentence within such five (5) Business Day period, Purchaser shall be deemed to have elected the option in clause (B) of the preceding sentence.

(e) Extension of Closing Date. If Seller is unable to cure any Unpermitted Exceptions prior to the

Closing, Seller shall have the right to postpone the Closing and extend the Closing Date for up to thirty (30) days by providing written notice to Purchaser no later than three (3) Business Days prior to the originally scheduled Closing Date.

Section 4.3 Assumed Contracts and Leases; Terminated Contracts. Within seven (7) days prior to the Bid Deadline, Purchaser shall deliver to Seller a list specifying which of the Contracts and Tenant Leases that Purchaser desires Seller to assume through the Chapter 11 Cases and then assign to Purchaser at the Closing (collectively, the "Assumed Contracts and Leases") and a separate list specifying which of the Contracts and Tenant Leases that Purchaser desires Seller to reject through the Chapter 11 Cases (collectively, the "Terminated Contracts"). Upon Seller's receipt of the aforementioned lists from Purchaser, said lists shall automatically be deemed appended to this Agreement as Schedule 4.3 without the necessity of any further action by either Party.

Section 4.4 Bankruptcy Related Contingencies. (a) The Bid Procedures Order shall have become a Final Order (the "Bid Procedures Approval Contingency") on or before July 29, 2011 (the "Bid Procedures Approval Deadline"); (b) the Disclosure Statement Order shall have become a Final Order (the "Disclosure Statement Approval Contingency") on or before September 9, 2011 (the "Disclosure Statement Approval Deadline"); (c) the Confirmation Order shall have become a Final Order (the "Plan Confirmation Contingency") on or before November 9, 2011 (the "Plan Confirmation Deadline"); and (d) the effective date of the Joint Chapter 11 Plan shall have occurred (the "Plan Effective Date Contingency") on or before

November 23, 2011 (the "Plan Effective Date Deadline"). The Bid Procedures Approval Contingency, the Disclosure Statement Approval Contingency, the Plan Confirmation Contingency and the Plan Effective Date Contingency are hereinafter sometimes collectively referred to as the "Bankruptcy Contingencies". The Bid Procedures Approval Deadline, the Disclosure Statement Approval Deadline, the Plan Confirmation Deadline and the Plan Effective Date Deadline are hereinafter sometimes collectively referred to as the "Bankruptcy Deadlines". In the event that Seller fails to satisfy any one or more of the Bankruptcy Contingencies by its respective Bankruptcy Deadline, Purchaser shall have the right to terminate this Agreement by providing written notice to Seller and Escrow Agent prior to the date which is five (5) Business Days after the corresponding Bankruptcy Deadline of the failed Bankruptcy Contingency. If Purchaser timely terminates this Agreement pursuant to the any one of the Bankruptcy Contingencies, Escrow Agent shall refund the Earnest Money to Purchaser, and Seller and Purchaser shall have no further rights or obligations under this Agreement, except those which expressly survive such termination. If Purchaser does not timely terminate this Agreement pursuant to one of the Bankruptcy Contingencies in accordance with this Section 4.4, Purchaser shall be deemed to have waived its rights to terminate this Agreement pursuant to that Bankruptcy Contingency.

ARTICLE V
SELLER'S REPRESENTATIONS AND WARRANTIES

Section 5.1 Representations and Warranties. To induce Purchaser to enter into this Agreement and to consummate the transaction contemplated herein, Seller hereby makes the representations and warranties in this Section 5.1, subject to the limitations set forth in Sections 5.2, 5.3 and 5.4, upon which Seller acknowledges and agrees that Purchaser is entitled to rely.

(a) Organization and Power. Seller is duly formed or organized, validly existing, in good standing in the jurisdiction of its formation or organization, and is qualified to do business in the jurisdiction in which the Hotel is located, and has all requisite power and authority to own and operate the Hotel as currently owned and operated and to own the Parking Deck as currently owned.

(b) Authority and Binding Obligation. Subject to the occurrence of the Plan Confirmation Contingency, (i) Seller has full power and authority to execute and deliver this Agreement and all documents now or hereafter to be executed and delivered by Seller under this Agreement, and to perform all obligations arising under this Agreement and such other documents, (ii) the execution by the undersigned on behalf of Seller, and the delivery and performance of this Agreement by Seller has been duly and validly authorized by all necessary action on the part of Seller, and (iii) this Agreement and such other documents now or hereafter to be executed and delivered by Seller under this Agreement, when executed and delivered,

will each constitute the legal, valid and binding obligations of Seller enforceable against Seller in accordance with its terms.

(c) Consents and Approvals; No Conflicts. Subject to the occurrence of the Plan Confirmation Contingency and recordation of any of the Closing Documents as appropriate, and except as disclosed in Schedule 5.1(c), (i) no filing with, and no permit, authorization, consent or approval of, any Governmental Authority or other Person is necessary for the consummation by Seller of the transaction contemplated by this Agreement, except to the extent the failure to obtain such permit, authorization, consent or approval would not have a material adverse effect on the ownership or operation of the Hotel or ownership of the Parking Deck, and (ii) neither the execution and delivery of this Agreement by Seller, nor the consummation by Seller of the transaction contemplated under this Agreement, nor compliance by Seller with any of the terms of this Agreement will: (A) violate any provision of Seller's organizational or governing documents; (B) violate any Applicable Law to which Seller is subject; or (C) result in a violation or breach of, or constitute a default under any of the Material Contracts, except to the extent such violation, breach or default would not have a material adverse effect on the ownership or operation of the Hotel or the ownership of the Parking Deck, or (D) result in the creation or imposition of any lien or encumbrance on the Property or any portion thereof.

(d) Title to Personal Property. Except as set forth in Schedule 5.1(d), Seller has good and valid title to all tangible Personal Property (other than the Excluded Property), which in each case shall be free

and clear of all liens and encumbrances as of the Closing.

(e) Condemnation. Seller has not received any written notice of any pending condemnation or other proceedings in eminent domain, and to Seller's Knowledge, no such condemnation or eminent domain proceedings are threatened against Seller or the Property or any portion thereof.

(f) Litigation. Except with respect to Employees (which are addressed in Section 5.1(g)) and Environmental Claims (which are addressed in Section 5.1(h)), and as set forth in Schedule 5.1(f), Seller has not (i) been served with any court filing in any litigation with respect to the Hotel or the Parking Deck in which Seller, Manager or an Affiliate of either is named a party, or (ii) received written notice of any charge or complaint from any Governmental Authority or other Person pursuant to any administrative, arbitration or similar adjudicatory proceeding with respect to the Hotel or the Parking Deck which has not been settled or dismissed.

(g) Employees.

(i) Manager is party to the collective bargaining agreements listed on Schedule 5.1(g) with respect to identified classifications of employees at the Hotel (each a "CBA"; collectively, the "CBAs"); and each CBA contains a provision for successor's recognition of the applicable union as exclusive bargaining representatives for these employee classifications at the Hotel. Except as set forth in Schedule 5.1(g), to Sellers' Knowledge there have been no unfair labor practices claims

filed against Seller, Manager or the Hotel during the past twenty-four (24) months. Except for the employment agreements set forth in Schedule 5.1(g) (the "Employment Agreements"), neither Seller nor Manager is a party to any written employment or compensation agreements other than bonus, commission, or incentive plans with any of the Employees. To Seller's Knowledge, neither Manager nor Seller is in material default under any Employment Agreement. Seller has made available to Purchaser a correct and complete copy of all Employment Agreements and CBAs (including all amendments, modifications and other agreements with respect thereto).

(ii) Except as set forth in Schedule 5.1(g), neither Seller nor Manager has (A) been served with any court filing in any litigation with respect to the Employees in which Seller or Manager is a named party or (B) Knowledge of any charge, claim, complaint, or request for a grievance or arbitration proceeding by any Employee, Governmental Authority or other Person against Seller alleging a breach or default under any CBA, Employment Agreement or a violation of any Applicable Law relating to the employment of the Employees, including any grievance filed under a CBA, any charge or complaint before the National Labor Relations Board, the Equal Employment Opportunity Commission, or any comparable state or local agency.

(iii) Schedule 5.1(g) contains an accurate and complete description of each of the Seller Employee Plans. With regard to each Seller Employee Plan which has been established by or is

administered by Seller or Manager, each such Seller Employee Plan complies with, has been established, qualified, invested and administered in compliance with its terms and ERISA, COBRA and other Applicable Laws. With regard to each Seller Employee Plan which has not been established by and is not administered by Seller or Manager, to Seller's Knowledge, each such Seller Employee Plan complies with, has been established, qualified, invested and administered in compliance with its terms and ERISA, COBRA and other Applicable Laws. Neither Seller nor Manager has made any plan or commitment to establish any new employee benefit plan or to modify any Seller Employee Plan (except to the extent required by law). Except as set forth in Schedule 5.1(g), neither Seller, Manager, nor any Affiliate of either (i) maintains, sponsors, participates in or contributes to (or has an obligation to contribute to) any (x) pension plan subject to Title IV of ERISA, (y) "multiemployer plan" within the meaning of Section (3)(37) of ERISA, or (z) plan described in Section 413(c) of the Tax Code, or (ii) has incurred any liability or taken any action, and to the Knowledge of Seller no action or event has occurred, that could reasonably be expected to cause any one of them to incur any liability under Section 412 of the Tax Code or Title IV of ERISA with respect to any "single-employer plan" (as defined in Section 4001(a)(15) of ERISA), or on account of a partial or complete withdrawal (as defined in Sections 4203 and 4205 of ERISA, respectively) from, or unpaid contribution with respect to, any multiemployer plan. All contributions with respect to each of the Seller Employee Plans for all periods prior to the Closing Date have been made or will be made prior to the

Closing Date. Notwithstanding anything to the contrary contained in this Section 5.1(g)(iii), Employer is obligated, under the terms of the CBAs, to accrue and pay monthly contributions to the union counterparties' health and welfare plans on behalf of the Employees which are within the classification of employees covered by the applicable CBA.

(iv) Manager has properly paid all wages and salaries and employment Taxes (including social security Taxes and other payroll Taxes and including any share owed by the employer and any share that it was required to withhold from the compensation paid to Employees) and is not liable for any penalties or arrears, except for any arrears that would exist in the Ordinary Course of Business and would be in compliance in all material respects with Applicable Law.

(h) Environmental Matters. Except as disclosed by the environmental reports listed in Schedule 5.1(h) (the "Environmental Reports"), to Seller's Knowledge, there are no Environmental Claims or violation of any Environmental Laws with respect to the Real Property which has not been cured or dismissed.

(i) Licenses and Permits. Schedule 5.1(i) sets forth a correct and complete list of the Licenses and Permits and Seller has made available to Purchaser a true and complete copy of the Licenses and Permits.

(j) Tenant Leases. Schedule 5.1(j) sets forth a correct and complete list of the Tenant Leases for the Hotel, and Seller has made available to Purchaser a true and complete copy of the Tenant Leases

(including all amendments, modifications and other written agreements with respect thereto). Except as set forth in Schedule 5.1(j), Seller has neither given nor received any written notice of any breach or default under any of the Tenant Leases that has not heretofore been cured or waived.

(k) Contracts. Schedule 5.1(k) sets forth a correct and complete list of the Material Contracts, and Seller has made available to Purchaser a true and complete copy of each of the Contracts (including all amendments, modifications and other written agreements with respect thereto). Except as set forth on Schedule 5.1(k), Seller has neither given nor received any written notice of any breach or default under any Material Contract which has not been cured.

(l) Franchise and Management Agreements. Except for the Franchise Agreement, the Management Agreement, the Asset Management Agreement and the Tenant Leases, Seller is not a party to any management, franchise, license, concession or other agreement for the management or operation of the Hotel.

(m) Insurance. Schedule 5.1(m) sets forth the insurance maintained by Seller with respect to the Hotel and the Parking Deck.

(n) Finders and Investment Brokers. Except for the Broker, Seller has not dealt with any Person who has acted, directly or indirectly, as a broker, finder, financial adviser or in such other capacity for or on behalf of Seller in connection with the transaction contemplated by this Agreement in a manner which

would entitle such Person to any fee or commission in connection with this Agreement or the transaction contemplated in this Agreement. Seller shall indemnify Purchaser Indemnitees from and against any Losses incurred by Purchaser Indemnitees as a result of any inaccuracy of the representation contained in this Section 5.1(n). The indemnity in this Section 5.1(n) shall survive the Closing or termination of this Agreement.

(o) Foreign Person. Seller is not a "foreign person" for purposes of the withholding provisions of Section 1445 of the Tax Code.

(p) Financial and Operating Statements. To Seller's Knowledge, the balance sheets and operating statements ("Financial Information") delivered to Purchaser are complete and accurate in all material respects as of the date thereof and were prepared in accordance with generally accepted accounting practices for the hotel industry consistently applied and in the Ordinary Course of Business. The Financial Information fairly presents the financial condition of Seller and the Hotel at the respective dates and the results of Seller's and the Hotel's operations for such periods. The books and records delivered or made available, or to be delivered or to made available, to Purchaser pursuant to this Agreement constitute all of the books and records for the periods specified and true, correct and complete copies have been or will be delivered or made available to Purchaser.

(q) Seller Due Diligence Materials. The Seller Due Diligence Materials delivered to Purchaser are accurate and complete copies. The Seller Due Diligence

Materials are not misleading in any material respect with respect to the subject matter thereof.

(r) Compliance with Applicable Laws. Seller has not received any written notice from any Governmental Authority of any violation of or noncompliance with any Applicable Laws with respect to the Property, which has not been cured, dismissed or waived in writing.

(s) Accounts Receivable. Schedule 5.1(s) sets forth a true and correct aging and summary of the Accounts Receivable as of the Effective Date. Seller has not received any written notice that any items comprising the Accounts Receivable are uncollectible, except as otherwise noted on Schedule 5.1(s).

Section 5.2 LIMITATION ON SELLER'S REPRESENTATIONS AND WARRANTIES. PURCHASER ACKNOWLEDGES AND AGREES THAT, EXCEPT AS OTHERWISE EXPRESSLY SET FORTH IN THIS AGREEMENT OR ANY CLOSING DOCUMENT, (I) THE PURCHASE OF THE PROPERTY SHALL BE ON AN "AS IS", "WHERE IS", "WITH ALL FAULTS BASIS", SUBJECT TO REASONABLE WEAR AND TEAR FROM THE DATE OF THIS AGREEMENT UNTIL THE CLOSING, AND (II) NONE OF SELLER, MANAGER, EMPLOYER OR ANY OF THEIR AFFILIATES, NOR ANY OF THEIR RESPECTIVE SHAREHOLDERS, MEMBERS, PARTNERS, TRUSTEES, DIRECTORS, OFFICERS, MANAGERS, EMPLOYEES, AGENTS OR REPRESENTATIVES, NOR ANY PERSON PURPORTING TO REPRESENT ANY OF THE FOREGOING, HAVE MADE ANY REPRESENTATION, WARRANTY, GUARANTY,

PROMISE, PROJECTION OR PREDICTION WHATSOEVER WITH RESPECT TO THE HOTEL OR THE PARKING DECK OR ANY ASPECT OF EITHER OR THE PROPERTY OR ANY PORTION THEREOF, WRITTEN OR ORAL, EXPRESS OR IMPLIED, ARISING BY OPERATION OF LAW OR OTHERWISE, INCLUDING, WITHOUT LIMITATION, ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, OR ANY REPRESENTATION OR WARRANTY AS TO (A) THE CONDITION, QUANTITY, QUALITY, USE, OCCUPANCY OR OPERATION OF THE PROPERTY OR ANY PORTION THEREOF, (B) THE PAST, PRESENT OR FUTURE REVENUES OR EXPENSES WITH RESPECT TO THE HOTEL OR THE PARKING DECK, (C) THE COMPLIANCE OF THE PROPERTY OR ANY PORTION THEREOF OR THE OPERATION OF THE HOTEL WITH ANY ZONING REQUIREMENTS, BUILDING CODES OR OTHER APPLICABLE LAW, OR (D) THE ACCURACY OF ANY ENVIRONMENTAL REPORTS OR OTHER INFORMATION SET FORTH IN THE SELLER DUE DILIGENCE MATERIALS PROVIDED TO PURCHASER WHICH WERE PREPARED FOR OR ON BEHALF OF SELLER. PURCHASER ACKNOWLEDGES AND AGREES THAT PURCHASER IS NOT RELYING ON ANY STATEMENT MADE OR INFORMATION PROVIDED TO PURCHASER BY SELLER, MANAGER, EMPLOYER OR ANY OF THEIR AFFILIATES, OR ANY OF THEIR RESPECTIVE SHAREHOLDERS, MEMBERS, PARTNERS, TRUSTEES, DIRECTORS, MANAGERS, OFFICERS, EMPLOYEES, AGENTS OR REPRESENTATIVES, OR ANY PERSON PURPORTING TO REPRESENT

ANY OF THE FOREGOING, EXCEPT FOR THE REPRESENTATIONS AND WARRANTIES EXPRESSLY MADE BY SELLER IN THIS AGREEMENT.

Section 5.3 Amendment to Representations, Warranties and Schedules. Notwithstanding anything to the contrary in this Agreement, Seller shall have the right to amend and supplement the representations and warranties contained in Section 5.1 of this Agreement and the schedules to this Agreement from time to time to the extent Seller did not have Knowledge as of the date of this Agreement of the matter being disclosed in such amendment or supplement or to the extent that facts regarding such matter changed subsequent to the making of the representation and warranty by providing a written copy of such amendment or supplement to Purchaser. No such amendment or supplement or the subject matter thereof shall be deemed a default by Seller under this Agreement. If such amendment or supplement is delivered after the expiration of the Due Diligence Period and such amendment or supplement contains a material modification that is adverse to Purchaser to any representation or warranty contained in Section 5.1, Purchaser may elect, no later than five (5) Business Days after receipt of Seller's notice, to proceed to the Closing notwithstanding such amendment or supplement or terminate this Agreement, in which case Escrow Agent shall refund the Earnest Money to Purchaser. If Purchaser does not make such election, within such five (5) Business Day period, Purchaser shall be deemed to have elected to proceed to the Closing. Seller's representations and warranties shall be deemed modified by any

amendment or supplement delivered in accordance with this Section 5.3.

Section 5.4 Effect of Purchaser's Knowledge. If Seller delivers written notice to Purchaser of a Seller breach of any representation or warranty made by Seller in this Agreement and Purchaser nevertheless elects to close this transaction, such representation or warranty by Seller with respect to such matter shall be deemed to be modified to reflect such writing.

ARTICLE VI
PURCHASER'S REPRESENTATIONS AND WARRANTIES

Section 6.1 Representations and Warranties. To induce Seller to enter into this Agreement and to consummate the transaction contemplated hereby, Purchaser hereby makes the representations and warranties in this Section 6.1, subject to the limitation in Section 6.2, upon which Purchaser acknowledges and agrees that Seller is entitled to rely.

(a) Organization and Power. Purchaser is duly organized, validly existing and in good standing under the laws of the State of Delaware, and has all requisite power and authority to own, lease and operate its properties and to carry on its business as now being conducted.

(b) Authority and Binding Obligation. (i) Purchaser has full power and authority to execute and deliver this Agreement and all documents now or hereafter to be executed and delivered by Purchaser under this Agreement, and to perform all obligations arising under this Agreement and such other

documents, (ii) the execution by the undersigned on behalf of Purchaser, and the delivery and performance of this Agreement by Purchaser has been duly and validly authorized by all necessary action on the part of Purchaser, and (iii) this Agreement and such other documents now or hereafter to be executed and delivered by Purchaser under this Agreement, when executed and delivered, and subject to the satisfaction of the Bankruptcy Contingencies on or before the applicable Bankruptcy Deadlines, will each constitute the legal, valid and binding obligations of Purchaser enforceable against Purchaser in accordance with its terms, except to the extent Seller itself is in default hereunder.

(c) Consents and Approvals; No Conflicts. Except with respect to the Bankruptcy Contingencies, (i) no filing with, and no permit, authorization, consent or approval of, any Governmental Authority or other Person is necessary for the consummation by Purchaser of its obligations under this Agreement, and (ii) neither the execution and delivery of this Agreement by Purchaser, nor the consummation by Purchaser of the transaction contemplated under this Agreement, nor compliance by Purchaser with any of the terms of this Agreement will: (A) violate any provision of the organizational or governing documents of Purchaser; (B) violate any Applicable Law to which Purchaser is subject; or (C) result in a violation or breach of or constitute a default under any contract, agreement or other instrument or obligation to which Purchaser is a party or by which any of Purchaser's properties are subject.

(d) Finders and Investment Brokers. Except for Broker, Purchaser has not dealt with any Person who

has acted, directly or indirectly, as a broker, finder, financial adviser or in such other capacity for or on behalf of Purchaser in connection with the transaction contemplated by this Agreement in any manner which would entitle such Person to any fee or commission in connection with this Agreement or the transaction contemplated in this Agreement. Purchaser shall indemnify Seller Indemnitees from and against any Losses incurred by Seller Indemnitees as a result of any inaccuracy of the representation contained in this Section 6.1(d). The indemnity in this Section 6.1(d) shall survive the Closing or termination of this Agreement.

Section 6.2 Effect of Seller's Knowledge. If Seller has Knowledge prior to the Closing of a breach of any representation or warranty made by Purchaser in this Agreement and Seller nevertheless elects to close this transaction, such representation or warranty by Purchaser with respect to such matter shall be deemed to be modified to reflect such Seller's Knowledge.

ARTICLE VII
COVENANTS

Section 7.1 Confidentiality.

(a) Disclosure of Confidential Information; Public Announcements. Purchaser shall keep confidential and not make any public announcement or disclose to any Person, any non-public information disclosed by the Inspections or in the Seller Due Diligence Materials or Purchaser Due Diligence Reports, and any other documents, materials, data or other information with respect to the Hotel and the Parking Deck which is not generally known to the

public (the "Confidential Information"); provided, however, that Purchaser shall be permitted to (i) disclose any Confidential Information to the extent required by court order or under Applicable Law, (ii) make a public announcement regarding the transaction contemplated in this Agreement after the expiration of the Due Diligence Period, provided that Seller shall approve the form and substance of any such public announcement, which approval shall not be unreasonably withheld, conditioned or delayed, or (iii) disclose any Confidential Information to any Person on a "need-to-know" basis, such as their respective directors, officers, partners, members, employees, attorneys, accountants, engineers, surveyors, consultants, lenders (including prospective lenders), investors (including prospective investors in any funds managed or advised by any direct or indirect Affiliate of Purchaser), managers, franchisors and such other Persons whose assistance is required to consummate the transactions contemplated in this Agreement; provided, however, that Purchaser shall (a) advise such Person of the confidential nature of such Confidential Information, and (b) use commercially reasonable efforts to cause such Person to maintain the confidentiality of such information. This Section 7.1(a) shall survive the termination of this Agreement, but not the Closing.

(b) Return of Seller Due Diligence Materials. If this Agreement is terminated, (i) Purchaser promptly shall return to Seller all original Seller Due Diligence Materials (it being understood and agreed that Purchaser shall have the right to retain a copy of such Seller Due Diligence Materials), and (ii) upon Seller's request, Purchaser shall promptly deliver to Seller copies of all third-party reports prepared by or for

Purchaser in connection with the Inspections. This Section 7.1(b) shall survive termination of this Agreement.

(c) Communication with Employees. Purchaser shall not, through its employees, agents, representatives or any other Person, directly or indirectly, initiate or pursue any communication with any Employees or any Person representing any Employees involving any matter with respect to the Hotel, the Employees or this Agreement, without Seller's prior written consent, which may not be unreasonably withheld, unless such communication is arranged by Seller.

Section 7.2 Operation of the Hotel Prior to Closing.

(a) Operation in Ordinary Course of Business. From the Effective Date until the Closing or earlier termination of this Agreement, Seller shall operate the Hotel in the Ordinary Course of Business, including, without limitation, (i) maintaining all existing insurance coverages as set forth in Schedule 5.1(m), (ii) maintaining the inventories of Supplies, F&B and Retail Merchandise in the Ordinary Course of Business, (iii) performing maintenance and repairs for the Hotel in the Ordinary Course of Business, and (iv) maintaining current wages, salaries, and benefits (except for those changes approved by Purchaser) and making reasonable efforts to retain the Employees; provided, however, that Seller shall be permitted to terminate the contracts identified as "Terminated Contracts" on Schedule 4.3.

(b) Contracts. From the Effective Date until the Closing or earlier termination of this Agreement, Seller shall not, without Purchaser's prior written consent, which shall not be unreasonably withheld, conditioned or delayed (i) amend, modify, extend, renew or terminate any existing Contracts (other than those identified as "Terminated Contracts" on Schedule 4.3) or Licenses and Permits, nor (ii) enter into any new Material Contracts.

Section 7.3 Licenses and Permits.

(a) Purchaser shall be responsible for obtaining the transfer of all Licenses and Permits (to the extent transferable) or the issuance of new licenses and permits, including, without limitation, the licenses and permits required for the sale and service of alcoholic beverages at the Hotel (the "Liquor License"). Purchaser, at its cost and expense, shall submit all necessary applications and other materials to the appropriate Governmental Authority and take such other actions to effect the transfer of Licenses and Permits or issuance of new licenses and permits, including, without limitation, the Liquor License, as of the Closing, and Seller shall use commercially reasonable efforts (at no cost or expense to Seller other than any de minimis cost or expense or any cost or expense which Purchaser agrees in writing to reimburse) to cooperate with Purchaser to cause the Licenses and Permits to be transferred or new licenses and permits to be issued to Purchaser. Notwithstanding anything to the contrary in this Section 7.3, Purchaser shall not post any notices at the Hotel or publish any notices required for the transfer of the Licenses and Permits or issuance of new licenses and permits, including, without limitation, the Liquor

License, prior to the expiration of the Due Diligence Period.

(b) Notwithstanding Section 7.3(a), if issuance or transfer of the Liquor License has not been obtained by the Closing Date, Seller agrees to execute such documents, including an Interim Liquor Management Agreement, in the form attached as Exhibit F, as are legal and customary to permit the continued sale of alcoholic beverages for up to six (6) months after the Closing Date pending such issuance or transfer. In such event, Purchaser shall maintain liquor liability insurance in amounts currently maintained by Seller naming Seller as an additional insured, and further agrees to indemnify, defend and hold Seller harmless from and against any liability, cost or expense arising out of Seller's cooperation with Purchaser during such interim period, except as a result of Seller's gross negligence or intentional misconduct. The provisions of this Section 7.3 shall survive the Closing.

Section 7.4 Employee Matters. Purchaser shall retain Manager (or an Affiliate of Manager) as the Employer of the Employees under the same terms and conditions of employment as existed immediately prior to the Closing. The provisions of this Section 7.4 shall survive the Closing.

Section 7.5 Tax Contests.

(a) Taxable Period Terminating Prior to Closing Date. Liquidation Trustee shall retain the right to commence, continue and settle any proceeding to contest any Taxes for any taxable period which terminates prior to the Closing Date, and shall be

entitled to any refunds or abatements of Taxes awarded in such proceedings.

(b) Taxable Period Including the Closing Date. Liquidation Trustee shall have the right to commence, continue and settle any proceeding to contest any Taxes for any taxable period which includes the Closing Date. Notwithstanding the foregoing, if Purchaser desires to contest any Taxes for such taxable period and Liquidation Trustee has not commenced any proceeding to contest any such Taxes for such taxable period, Purchaser shall provide written notice requesting that Liquidation Trustee contest such Taxes. If Liquidation Trustee desires to contest such Taxes, Liquidation Trustee shall provide written notice to Purchaser within five (5) Business Days after receipt of Purchaser's request confirming that Liquidation Trustee will contest such Taxes, in which case Liquidation Trustee shall proceed to contest such Taxes, and Purchaser shall not have the right to contest such Taxes. If Liquidation Trustee fails to provide such written notice confirming that Liquidation Trustee will contest such Taxes within such five (5) Business Day period, Purchaser shall have the right to contest such Taxes. Any refunds or abatements awarded in such proceedings shall be used first to reimburse the Party contesting such Taxes for the reasonable costs and expenses incurred by such Party in contesting such Taxes, and the remainder of such refunds or abatements shall be prorated between Liquidation Trustee and Purchaser as of the Cut-Off Time, and the Party receiving such refunds or abatements promptly shall pay such prorated amount due to the other Party.

(c) Taxable Period Commencing On or After Closing Date. Purchaser shall have the right to commence, continue and settle any proceedings to contest Taxes for any taxable period which commences on or after the Closing Date, and shall be entitled to any refunds or abatements of Taxes awarded in such proceedings.

(d) Cooperation. Liquidation Trustee and Purchaser shall use commercially reasonable efforts to cooperate with the Party contesting the Taxes (at no cost or expense to the Party not contesting the Taxes other than any de minimis cost or expense or any cost or expense which the requesting Party agrees in writing to reimburse) and to execute and deliver any documents and instruments reasonably requested by the Party contesting the Taxes in furtherance of the contest of such Taxes.

(e) Survival. The provisions of this Section 7.5 shall survive the Closing.

Section 7.6 Notices and Filings. Seller shall have the right, at its sole cost and expense, to send an announcement to all guests and customers at the Hotel as of the Closing and all Persons who have Bookings at the Hotel as of the Closing, in form and substance reasonably acceptable to Purchaser, informing such Persons of the change in ownership and operation of the Hotel to Purchaser. Seller and Purchaser shall use commercially reasonable efforts to cooperate with each other (at no cost or expense to the Party whose cooperation is requested, other than any de minimis cost or expense or any cost or expense which the requesting Party agrees in writing to reimburse) to provide written notice to any Person under any of the

Tenant Leases, the Contracts, the Licenses and Permits, and to effect any registrations or filings with any Governmental Authority or other Person, regarding the change in ownership or operation of the Hotel. This Section 7.6 shall survive the Closing.

Section 7.7 Further Assurances. From the date of this Agreement until the Closing or termination of this Agreement, Seller and Purchaser shall use commercially reasonable efforts to take, or cause to be taken, all actions and to do, or cause to be done, all things necessary, proper or advisable to consummate the transaction contemplated in this Agreement, including, without limitation, (i) obtaining all necessary consents, approvals and authorizations required to be obtained from any Governmental Authority, including, without limitation, the Bankruptcy Court, or other Person under this Agreement or Applicable Law, and (ii) effecting all registrations and filings required under this Agreement or Applicable Law. After the Closing, Seller and Purchaser shall use commercially reasonable efforts (at no cost or expense to such Party, other than any de minimis cost or expense or any cost or expense which the requesting Party agrees in writing to reimburse) to further effect the transaction contemplated in this Agreement. This Section 7.7 shall survive the Closing.

Section 7.8 Franchise License Application. Within fifteen (15) Business Days after the Bid Procedures Approval Date, Purchaser shall submit a completed application for a franchise license agreement for the Hotel to a nationally recognized hotel chain franchisor. Purchaser and Seller acknowledge that any such franchisor is not bound to approve the application

submitted by Purchaser and that any approval of the Purchaser's application is entirely within the sole discretion of any such franchisor.

Section 7.9 Purchaser's Post Closing Payments to the Liquidating Trust. Within sixty (60) days following each of the first three (3) anniversaries of the Closing Date, the Purchaser shall deliver the following specified amounts to the Liquidating Trust for the Liquidation Trustee to distribute to the Holders of Allowed General Unsecured Claims and the Holders of the Allowed Lender Deficiency Claim pursuant to the Joint Chapter 11 Plan: (a) first (1st) anniversary - $150,000.00; (b) second (2nd) anniversary - $300,000.00; and (c) third (3rd) anniversary - $300,000.00. All capitalized terms used in this Section 7.9 which are not otherwise defined in this Agreement shall have the meanings ascribed to such terms in the Joint Chapter 11 Plan. This Section 7.9 shall survive the Closing.

ARTICLE VIII
CONDITIONS PRECEDENT

Section 8.1 Conditions Precedent to the Obligations of Both Seller and Purchaser. The respective obligations of Seller and Purchaser to close the transaction contemplated under this Agreement are subject to the requirement at or prior to the Closing Date that no preliminary or permanent injunction or other order, decree or ruling shall have been issued by a court of competent jurisdiction or by any Governmental Authority, and no Applicable Law shall have been enacted (or passed which upon enactment), would make illegal or invalid or otherwise prevent the consummation of the transaction contemplated under this Agreement.

Section 8.2 Additional Conditions to Purchaser's Obligations. Purchaser's obligations to close the transactions contemplated under this Agreement also are subject to the satisfaction at or prior to the Closing of the following conditions precedent (the "Purchaser Closing Conditions"):

(a) Seller's Deliveries. Seller shall have delivered to Purchaser or deposited with Escrow Agent in the Closing Escrow for the benefit of Purchaser, all of the Closing Documents and other items set forth in Section 9.3.

(b) Representations and Warranties. Each of Seller's representations and warranties made in this Agreement (as the same may be updated pursuant to Section 5.3) shall be true and correct in all material respects as of the Closing (unless such representation or warranty is made expressly as of another date).

(c) Covenants and Obligations. Seller shall have performed in all material respects all of its covenants and obligations under this Agreement.

(d) Title Policy. The Title Company shall have committed to issue an owner's title insurance policy to Purchaser (which may be in the form of a mark-up of the Title Commitment) in accordance with the Title Commitment, insuring Purchaser's fee simple interest in the Real Property as of the Closing Date, with gap coverage from the Closing through the date of recording, with extended coverage (deleting the so-called general or standard exceptions) in the Title Commitment, together with any endorsements reasonably requested by Purchaser, subject only to the Permitted Exceptions (the "Title Policy").

(e) Franchise Agreement. Purchaser shall have entered into a new franchise license agreement for the Hotel with a nationally recognized hotel chain franchisor in form and substance acceptable to Purchaser in its sole and absolute discretion.

(f) Estoppel Certificates—Hotel Contracts. Purchaser shall notify Seller, in writing prior to the end of the Due Diligence Period, of the Material Contracts and Tenant Leases for which Purchaser requires estoppel certificates. Each of said estoppel certificates shall be in writing from the parties to such Material Contract or Tenant Lease and shall state that such Material Contract or Tenant Lease is in full force and effect, has not been amended or modified except as therein indicated, that no party is then in default under such Material Contract or Tenant Lease (or if any default is known to exist, or would arise with the giving of notice or the passage of time, stating the nature of such default) and shall confirm any other factual matters with respect to the applicable Material Contract or Tenant Lease reasonably requested by Purchaser. The estoppel certificates herein referred to shall be in form and substance reasonably satisfactory to Purchaser and dated not more than thirty (30) days prior to the Closing Date and delivered to Seller prior to the Closing Date.

(g) Bankruptcy Conditions. Seller shall have: (i) caused the Bankruptcy Contingencies to be satisfied by each of the applicable Bankruptcy Deadlines; and (ii) obtained a Final Order authorizing Seller's assumption of the Assumed Contracts and Leases and the assignment of same to Purchaser, to the extent not otherwise included within the Confirmation Order.

The Purchaser Closing Conditions are for the benefit of Purchaser, and Purchaser shall have the right, but no obligation, to waive any of the Purchaser Closing Conditions at or prior to the Closing.

Section 8.3 Additional Conditions to Seller's Obligations. Seller's obligations to close the transactions contemplated under this Agreement are subject to the satisfaction at or prior to the Closing of the following conditions precedent (the "Seller Closing Conditions"):

(a) Receipt of the Purchase Price. Purchaser shall have paid the Purchase Price to Seller pursuant to Section 3.4, and Escrow Agent shall have disbursed the Earnest Money to Seller.

(b) Purchaser's Deliveries. Purchaser shall have delivered to Seller or deposited with Escrow Agent in the Closing Escrow for the benefit of Seller, all of the Closing Documents and other items set forth in Section 9.4.

(c) Representations and Warranties. Each of the representations and warranties of Purchaser made in this Agreement shall be true and correct in all material respects as of the Closing (unless such representation or warranty is made expressly as of another date).

(d) Covenants and Obligations. Purchaser shall have performed in all material respects all of its covenants and obligations under this Agreement, to the extent required to be performed by Purchaser prior to the Closing.

The Seller Closing Conditions are for the benefit of Seller, and Seller shall have the right to waive any of the Seller Closing Conditions at or prior to the Closing.

Section 8.4 Frustration of Closing Conditions. Seller and Purchaser may not rely on the failure of the Seller Closing Conditions or Purchaser Closing Conditions, respectively, if such failure was caused by such Party's failure to act in good faith or to use its commercially reasonable efforts to cause the Closing to occur.

ARTICLE IX
CLOSING

Section 9.1 Closing Date. The closing of the transaction contemplated under this Agreement (the "Closing") shall occur on the date which is five (5) Business Days after the date on which the Confirmation Order becomes a Final Order, or such other date as agreed to in writing between Seller and Purchaser (the date on which the Closing occurs is referred to herein as the "Closing Date"), at the offices of Seller's counsel or such other place as agreed to in writing between Seller and Purchaser.

Section 9.2 Closing Escrow. The Closing shall take place by means of a so-called "New York-style" escrow (the "Closing Escrow"). On or prior to the Closing Date, Seller and Purchaser shall enter into a closing escrow agreement with the Title Company with respect to the Closing Escrow in form and substance reasonably acceptable to Seller, Purchaser and the Title Company (the "Closing Escrow Agreement") pursuant to which (i) all of the documents required to be delivered by Seller and Purchaser pursuant to this Agreement (the

"Closing Documents") shall be deposited with Title Company; (ii) the Purchase Price to be paid by Purchaser pursuant to Section 3.4 shall be deposited with Title Company, and (iii) at the Closing, the Closing Documents shall be delivered to Seller and Purchaser (as the case may be) and the Purchase Price shall be disbursed to Seller pursuant to the Closing Escrow Agreement.

Section 9.3 Seller's Deliveries. At the Closing, Seller shall deliver or cause to be delivered to Purchaser or deposited with Title Company in the Closing Escrow for the benefit of Purchaser all of the (i) documents, each of which shall have been duly executed by Seller and acknowledged (if required), and (ii) other items, set forth in this Section 9.3, as follows:

(a) A certificate re-making the representations and warranties set forth in Section 5.1 as of the Closing Date, subject to the limitations contained in Sections 5.2, 5.3 and 5.4.

(b) A grant deed in the form of Exhibit B, conveying the Real Property to Purchaser, subject only to the Permitted Exceptions;

(c) A Bill of Sale in the form of Exhibit C, transferring the FF&E, Supplies, Attic Stock, F&B, Retail Merchandise and Accounts Receivable to Purchaser, free and clear of all liens and encumbrances;

(d) An Assignment and Assumption of Leases and Contracts in the form of Exhibit D, assigning the Tenant Leases and the Contracts to Purchaser, with the assumption by Purchaser of the liabilities and

obligations thereunder from and after the Closing Date;

(e) A General Assignment and Assumption Agreement in the form of Exhibit E, assigning the Licenses and Permits, Intangible Property and Bookings, with the assumption by Purchaser of the liabilities and obligations thereunder from and after the Closing Date, as well as an assumption by Purchaser of any obligations with respect to which Purchaser received a credit at the Closing;

(f) A written agreement between RADLAX HOTEL and Manager terminating the Management Agreement;

(g) A written agreement between RADLAX HOTEL and Asset Manager terminating the Asset Management Agreement;

(h) A written agreement between RADLAX HOTEL and Franchisor terminating the Franchise Agreement;

(i) Such agreements, affidavits or other documents as may be reasonably required by the Title Company from the Seller to issue the Title Policies;

(j) Any required real estate transfer tax declarations or similar documents required in connection with any tax imposed by any Governmental Authority in connection with the transaction contemplated hereunder;

(k) A FIRPTA affidavit in the form set forth in the regulations under Section 1445 of the Tax Code;

(l) To the extent not previously delivered to Purchaser, all originals (or copies if originals are not available) of the Tenant Leases, the Contracts, the Licenses and Permits, keys and lock combinations in Seller's Possession, which shall be located at the Hotel on the Closing Date and deemed to be delivered to Purchaser upon delivery of possession of the Hotel;

(m) The Settlement Statement prepared pursuant to Section 11.1;

(n) Intentionally omitted;

(o) To the extent not already delivered by Seller, notices to tenants to change in ownership of the Hotel, if requested by Purchaser and notices to any vendors or other third parties under Hotel contracts or as otherwise may be reasonable requested by Purchaser with respect to any portion of the Property purchased hereby

(p) A duly executed preliminary change of ownership report in the form requested by the Title Company; and

(q) Such other documents and instruments as may be reasonably requested by Purchaser in order to consummate or better effectuate the transaction contemplated in this Agreement.

Section 9.4 Purchaser's Deliveries. At the Closing, Purchaser shall deliver or cause to be delivered to Seller, the Liquidating Trust or deposited with Title Company in the Closing Escrow for the benefit of Seller and the Liquidating Trust all of the (i) documents, each of which shall have been duly

executed by Purchaser and acknowledged (if required), and (ii) other items, set forth in this Section 9.4, as follows:

(a) A certificate re-making the representations and warranties set forth in Section 6.1 as of the Closing Date, subject to the limitations contained in Section 6.2.

(b) The Purchase Price to be paid by Purchaser pursuant to Section 3.4.

(c) A letter of direction to Escrow Agent directing Escrow Agent to disburse the Earnest Money and the balance of the Purchase Price to the Liquidating Trust; and

(d) A counterpart of each of the documents and instruments to be delivered by Seller under Section 9.3 which require execution by Purchaser; and

(e) Such other documents and instruments as may be reasonably requested by Seller or the Title Company in order to consummate or better effectuate the transaction contemplated in this Agreement.

Section 9.5 Possession. Seller shall deliver the Property and possession of the Hotel and the Parking Deck to Purchaser upon the Closing, subject to the Permitted Exceptions.

ARTICLE X
PRORATIONS; ACCOUNTS RECEIVABLE; TRANSACTION COSTS

Section 10.1 Prorations. The items of revenue and expense with respect to the Hotel set forth in this Section 10.1 shall be prorated between Seller and Purchaser (the "Prorations"), using a 365 day year, as of 11:59 p.m. (Pacific Time) on the day preceding the Closing Date, or such other time expressly provided in this Section 10.1 (the "Cut-Off Time"), so that the Closing Date is a day of income and expense for Purchaser. Purchaser shall receive a credit for any items of expense in this Section 10.1 to the extent the same are accrued or due and payable but unpaid as of the Cut-Off Time in which case Purchaser shall be obligated to pay such expense. Seller shall receive a credit for any of the items of expense in this Section 10.1 which have been paid prior to or at the Closing to the extent such payment relates to any period of time after the Cut-Off Time.

(a) Taxes. The Liquidating Trust shall be responsible for the payment of real estate Taxes that have accrued prior to the Cut-Off Time. To the extent the amount of real estate Taxes for the year in which the Closing occurs or for any prior year are not known as of the Closing Date, the amount of such real estate Taxes for such years shall be estimated based upon one hundred and ten percent of the most recent available real estate tax bills and prorated as of the Cut-Off Time between Purchaser and the Liquidating Trust, and Purchaser shall receive a credit at the Closing for the amount of such estimated unpaid real estate Taxes attributable to all periods prior to the Cut-Off Time. Such proration shall be final.

(b) Tenant Leases. Any rents and other amounts prepaid, accrued or due and payable under the Tenant Leases shall be prorated as of the Cut-Off Time between Purchaser and Seller. Purchaser shall receive a credit for all security deposits held by Seller under the Tenant Leases which are transferred to Purchaser, and Purchaser thereafter shall be obligated to refund or apply such deposits in accordance with the terms of such Tenant Leases.

(c) Contracts. Any amounts prepaid, accrued or due and payable under the Contracts (other than for utilities which proration is addressed separately in this Section 10.1(e)) shall be prorated as of the Cut-Off Time between Seller and Purchaser. Purchaser shall receive a credit for all deposits held by Seller under the Contracts which are transferred to Purchaser, and Purchaser thereafter shall be obligated to refund or apply such deposits in accordance with the terms of such Contracts. Seller shall receive a credit for all deposits made by Seller under the Contracts which are transferred to Purchaser and which remain on deposit for the benefit of Purchaser.

(d) Licenses and Permits. All amounts prepaid, accrued or due and payable under any Licenses and Permits (other than utilities which are separately prorated under Section 10.1(e)) transferred to Purchaser shall be prorated as of the Cut-Off Time between Seller and Purchaser. Seller shall receive a credit for all deposits made by Seller under the Licenses and Permits which are transferred to Purchaser and which remain on deposit for the benefit of Purchaser.

(e) Utilities. All utility services shall be prorated as of the Cut-Off Time between Purchaser and Seller. To the extent possible, readings shall be obtained for all utilities as of the Cut-Off Time. If not possible, the cost of such utilities shall be prorated between Seller and Purchaser by estimating such cost on the basis of the most recent bill for such service; provided, however, that after the Closing, Seller and Purchaser shall reprorate the amount for such utilities and pay any deficiency in the original proration to the other Party promptly upon receipt of the actual bill for the relevant billing period. Seller shall receive a credit for all fuel stored at the Hotel based on Seller's cost for such fuel. Seller shall receive a credit for all deposits transferred to Purchaser and which remain on deposit for the benefit of Purchaser with respect to such utility contracts, otherwise such deposits shall be refunded to Seller. The reproration obligation in this Section 10.1(e) shall survive the Closing.

(f) Compensation. Seller shall (or shall cause Manager or Employer to) pay all Compensation due to the Employees for all periods prior to the Cut-Off Time, provided, however that if any Employee's shift begins but does not end prior to the Cut-Off Time, Seller shall pay all Compensation due to such Employee until such Employee's shift ends on the Closing Date. Purchaser shall grant Seller access to the Hotel, post-Closing, in order to distribute checks to Employees for Compensation due such Employees in accordance with this Section 10.1(f). The obligations under this Section 10.1(f) shall survive the Closing.

(g) Accrued and Earned Vacation. Purchaser shall receive a credit in an amount equal to one

hundred percent (100%) of the Accrued and Earned Vacation Pay for all Employees.

(h) Deposits for Bookings. Purchaser shall receive a credit for all prepaid deposits for Bookings scheduled for accommodations or events on or after the Closing Date which Purchaser is obligated to honor pursuant to this Agreement.

(i) Property Held for Sale at the Hotel. Seller shall not receive a credit for any Art, any Retail Merchandise, or any unopened items of F&B, it being understood that the Purchase Price includes consideration for said items.

(j) Restaurants, Bars and Banquets. Seller shall close out the transactions in the restaurants and bars and any banquets in the Hotels that remain open after Cut-Off Time as of such time as such facilities are closed on the Closing Date and retain all monies collected as of such bar, restaurant or banquet closing, and Purchaser shall be entitled to any monies collected from the restaurants and bars and any banquets thereafter.

(k) Vending Machines. Seller shall remove all monies from all vending machines, laundry machines, pay telephones and other coin-operated equipment as of the Cut-Off Time and shall retain all monies collected therefrom as of the Cut-Off Time, and Purchaser shall be entitled to any monies collected therefrom after the Cut-Off Time.

(l) Trade Payables. Except to the extent an adjustment or proration is made under another subsection of this Section 10.1, (i) Seller shall pay in

full prior to the Closing all amounts payable to vendors or other suppliers of goods or services to the Hotel (the "Trade Payables") which are due and payable as of the Closing Date for which goods or services have been delivered to the Hotel prior to the Closing, and (ii) Purchaser shall receive a credit for the amount of such Trade Payables which have accrued, but are not yet due and payable as of the Closing Date, and Purchaser shall pay all such Trade Payables accrued as of the Closing Date when such Trade Payables become due and payable up to the amount of such credit; provided, however, Seller and Purchaser shall reprorate the amount of credit for any Trade Payables and pay any deficiency in the original proration to the other Party promptly upon receipt of the actual bill for such goods or services. Seller shall receive a credit for all advance payments or deposits made with respect to FF&E, Supplies, Attic Stock, F&B and Retail Merchandise, which has been ordered, but not delivered to the Hotel prior to the Closing Date and Purchaser shall pay the amounts which become due and payable for such FF&E, Supplies, Attic Stock, F&B and Retail Merchandise which were ordered prior to the Closing. The reproration obligation in this Section 10.1(l) shall survive the Closing.

(m) Cash. Seller shall receive a credit for all cash on hand or on deposit in any house bank at the Hotel which shall be transferred to Purchaser.

(n) Attic Stock and Supplies. Seller shall not receive a credit for any Attic Stock or any unopened Supplies, it being understood that the Purchase Price includes consideration for said items.

(o) Other Adjustments and Prorations. All other items of income and expense as are customarily adjusted or prorated upon the sale and purchase of a hotel property similar to the Hotel shall be adjusted and prorated between Seller and Purchaser accordingly.

Section 10.2 Accounts Receivable.

(a) Guest Ledger. At the Closing, Seller shall receive a credit in an amount equal to: (i) all amounts charged to the Guest Ledger for all room nights up to (but not including) the night during which the Cut-Off Time occurs, and (ii) one-half (½) of all amounts charged to the Guest Ledger for the room night which includes the Cut-Off Time (other than any restaurant or bar charges for such room night, which are otherwise prorated under Section 10.1(j)), and Purchaser shall be entitled to retain all deposits made and amounts collected for such Guest Ledger.

(b) Accounts Receivable (Other than Guest Ledger). At the Closing, Seller shall receive a credit for all Accounts Receivable in accordance with the percentages set forth herein (other than the Guest Ledger which is addressed in Section 10.2(a)), and Purchaser shall be entitled to all amounts collected for such Accounts Receivable. Seller's credit for Accounts Receivable shall be discounted by (i) zero percent (0%) for Accounts Receivable outstanding for sixty (60) days or less, (ii) ten percent (10%) for Accounts Receivable outstanding for between sixty-one (61) and one hundred twenty (120) days, and (iii) twenty-five percent (25%) for Accounts Receivable outstanding for more than one hundred twenty (120) days.

Section 10.3 Settlement Statement. On the day prior to the Closing, Seller and Purchaser, through their respective employees, agents or representatives, jointly shall make such examinations, audits and inventories of the Hotel as may be necessary to make the adjustments and Prorations to the Purchase Price as set forth in Sections 10.1 and 10.2 or any other provisions of this Agreement. Based upon such examinations, audits and inventories, Seller and Purchaser jointly shall prepare prior to the Closing a settlement statement (the "Settlement Statement"), which shall set forth Seller's and Purchaser's best estimate of the amounts of the items to be adjusted and prorated under this Agreement. The Settlement Statement shall be approved and executed by Seller and Purchaser, and shall be binding and conclusive on Seller and Purchaser with respect to the items set forth in the Settlement Statement. If, at any time within ninety (90) days after the Closing Date, either Seller or Purchaser discovers any items which should have been included in the Settlement Statement but were omitted therefrom or items which were incorrectly adjusted or prorated therein, such items shall be adjusted and prorated in the same manner as if their existence or such error had been known at the time of the preparation of the Settlement Statement, and the Party in whose favor such original error or omission was made shall refund such difference to the other Party promptly after the original error or omission is discovered. Purchaser shall give Seller access to Purchaser's books and records from and after the Closing Date for the purpose of making the adjustments contemplated by this Section 10.3. This Section 10.3 shall survive the Closing.

Section 10.4 Transaction Costs.

(a) Seller's Transaction Costs. In addition to the other costs and expenses to be paid by Seller set forth elsewhere in this Agreement, Seller shall pay for the following costs in connection with this transaction: (i) the fees and expenses of its own attorneys and accountants; (ii) the cost and expense of the Title Commitment, the standard premium for the Title Policy (excluding extended coverage over the general exceptions), (iii) all state, county and municipal transfer taxes due and payable in connection with the conveyance of the Real Property from Seller to Purchaser, (iv) the fees and expenses of removing any Unpermitted Exceptions which Seller elects or is required to remove pursuant to Section 4.2(d); (v) the commission due to Broker; and (vi) one-half of the fees and expenses for the Escrow Agent.

(b) Purchaser's Transaction Costs. In addition to the other costs and expenses to be paid by Purchaser set forth elsewhere in this Agreement, Purchaser shall pay for the following costs in connection with this transaction: (i) the fees and expenses of its own attorneys and accountants; (ii) the fees and expenses incurred by Purchaser for Purchaser's Inspectors or otherwise in connection with the Inspections; (iii) the cost and expense of extended coverage over the general exceptions and the cost of any endorsements to the Title Policy, (iv) any recording or filing charges payable in connection with the recordation of the Real Property conveyance documents with the recorder's office; (v) any mortgage tax, title insurance fees and expenses for any loan title insurance policies, recording charges or other amounts payable in connection with any financing obtained by Purchaser;

and (vi) one-half of the fees and expenses for the Escrow Agent.

(c) Other Transaction Costs. All other fees, costs and expenses not expressly addressed in this Section 10.4 or elsewhere in this Agreement shall be allocated between Seller and Purchaser in accordance with applicable local custom for similar transactions.

ARTICLE XI TRANSITION PROCEDURES

Section 11.1 Safe Deposit Boxes. Prior to the Closing, Seller shall notify all guests or customers who are then using a safe deposit box at the Hotel advising them of the pending change in ownership and operation of the Hotel and requesting them to conduct an inventory and verify the contents of such safe deposit box. All inventories by such guests or customers shall be conducted under the joint supervision of representatives of Seller and Purchaser. Upon such inventory and verification, Seller shall deliver to Purchaser all keys, receipts and agreements for such safe deposit box (and thereafter such safe deposit box shall deemed an "Inventoried Safe Deposit Box"). If the Closing does not occur on the Closing Date for any reason whatsoever, Purchaser immediately shall return all keys, receipts and agreements to Seller for such Inventoried Safe Deposit Boxes. Upon Closing, Seller shall deliver to Purchaser all keys in Seller's Possession for all safe deposit boxes not then in use, and a list of all safe deposit boxes which are then in use, but not yet inventoried by the depositor (the "Non-Inventoried Safe Deposit Boxes"), with the name and room number of such depositor. After the Closing, Seller and Purchaser shall make appropriate arrangements for guests and customers at the Hotel to

inventory and verify the contests of the Non-Inventoried Safe Deposit Boxes, and upon such inventory and verification, Seller shall deliver to Purchaser all keys, receipt and agreements for such safe deposit box (and such safe deposit box thereafter shall constitute an Inventoried Safe Deposit Box). Purchaser shall be responsible for, and shall indemnify the Seller Indemnitees from and against any Losses incurred with respect to, any theft, loss or damage to the contents of any safe deposit box from and after the time such safe deposit box is deemed an Inventoried Safe Deposit Box pursuant to this Section 11.1. Seller shall be responsible for, and shall indemnify the Purchaser Indemnitees from and against any Losses incurred, with respect to, any theft, loss or damage to the contents of any safe deposit box prior to the time such safe deposit box is deemed an Inventoried Safe Deposit Box. This Section 11.1 shall survive the Closing.

Section 11.2 Baggage. On the Closing Date, representatives of Seller and Purchaser jointly shall make a written inventory of all baggage, boxes and similar items checked in or left in the care of Seller at the Hotel, and Seller shall deliver to Purchaser the keys to any secured area which such baggage and other items are stored (the "Inventoried Baggage"). Purchaser shall be responsible for, and shall indemnify the Seller Indemnitees from and against any Losses incurred, with respect to any theft, loss or damage to any Inventoried Baggage from and after the time of such inventory, and any other baggage, boxes or similar items left in the care of Purchaser. Seller shall be responsible for, and shall indemnify the Purchaser Indemnitees from and against any Losses incurred, with respect to any theft, loss or damage to any

Inventoried Baggage prior to the time of such inventory, and any other baggage, boxes or similar items left in the care of Seller. This Section 11.2 shall survive the Closing.

ARTICLE XII
DEFAULT; FAILURE OF CLOSING CONDITIONS

Section 12.1 Seller's Default. If (i) at any time prior to the Closing, Seller is in material breach or default of any of its covenants or obligations under this Agreement, which default is not caused by a Purchaser Default, or (ii) at the Closing, Seller has not satisfied the Purchaser Closing Conditions set forth in Sections 8.2(a) or (c) (each, a "Seller Default"), and Seller has not cured such Seller Default within five (5) Business Days after Seller's receipt of written notice of such Seller Default from Purchaser, then Purchaser, as its sole and exclusive remedies for such Seller Default, may elect to (i) terminate this Agreement, in which case Escrow Agent shall refund the Earnest Money to Purchaser, Seller shall reimburse Purchaser for is actual out-of-pocket expenses, including reasonable attorneys fees and disbursements, up to a maximum of $250,000, and Seller and Purchaser shall have no further rights or obligations under this Agreement, except those which expressly survive such termination; (ii) proceed to the Closing without any reduction in or setoff against the Purchase Price; or (iii) bring an action for specific performance; provided, however that if specific performance is unavailable due to any intentional action of Seller, Purchaser shall be entitled to pursue all available remedies at law or in equity.

Section 12.2 Purchaser's Default. If (i) Purchaser has not deposited the Earnest Money within the time

period provided in Section 3.3(a), (ii) at any time prior to the Closing, Purchaser is in material breach or default of its covenants or obligations under this Agreement, which breach or default is not caused by a Seller Default, or (iii) at Closing, Purchaser has not satisfied any one or more Seller Closing Conditions to be satisfied by Purchaser at or prior to the Closing (each, a "Purchaser Default"), and Purchaser has not cured such Purchaser Default within five (5) Business Days after Purchaser's receipt of written notice of such Purchaser Default from Seller, then Seller, as its sole and exclusive remedy, may elect to terminate this Agreement by providing written notice to Purchaser, in which case Purchaser shall cause Escrow Agent to disburse the Earnest Money to Seller within five (5) Business Days after such termination, and Seller and Purchaser shall have no further rights or obligations under this Agreement, except those which expressly survive such termination. Purchaser's obligation to cause Escrow Agent to disburse the Earnest Money to Seller shall survive such termination.

SELLER AND PURCHASER AGREE THAT IF THIS AGREEMENT IS TERMINATED PURSUANT TO THIS SECTION 12.2, THE DAMAGES THAT SELLER WOULD SUSTAIN AS A RESULT OF SUCH TERMINATION WOULD BE DIFFICULT IF NOT IMPOSSIBLE TO ASCERTAIN. ACCORDINGLY, SELLER AND PURCHASER AGREE THAT SELLER SHALL RETAIN THE EARNEST MONEY AS FULL AND COMPLETE LIQUIDATED DAMAGES AND AS SELLER'S SOLE AND EXCLUSIVE REMEDY FOR SUCH TERMINATION; PROVIDED, HOWEVER, THAT SELLER SHALL RETAIN ALL RIGHTS AND REMEDIES UNDER THIS AGREEMENT WITH

RESPECT TO THOSE OBLIGATIONS WHICH EXPRESSLY SURVIVE SUCH TERMINATION.

THE PARTIES ACKNOWLEDGE THAT THE PAYMENT OF SUCH LIQUIDATED DAMAGES IS NOT INTENDED AS A FORFEITURE OR PENALTY WITHIN THE MEANING OF CALIFORNIA CIVIL CODE SECTIONS 3275 OR 3369, BUT IS INTENDED TO CONSTITUTE LIQUIDATED DAMAGES TO SELLER PURSUANT TO CALIFORNIA CIVIL CODE SECTIONS 1671, 1676 AND 1677.

ARTICLE XIII
CASUALTY; CONDEMNATION

Section 13.1 Casualty.

(a) Material Casualty. If the Property or any portion thereof is damaged or destroyed by fire or any other casualty prior to the Closing (a "Casualty"), Seller shall give written notice of such Casualty to Purchaser promptly after the occurrence of such Casualty. If the amount of the repair, restoration or replacement required by such Casualty, as reasonably determined by Purchaser, equals or exceeds five percent (5%) of the Purchase Price (a "Material Casualty") and the Casualty was not caused by Purchaser or Purchaser's Inspectors, or their respective employees or agents, then Purchaser shall have the right, in its sole discretion, to (i) terminate this Agreement, in which case Escrow Agent shall refund the Earnest Money to Purchaser and Seller and Purchaser shall have no further rights or obligations under this Agreement, except those which expressly survive such termination, or (ii) proceed to the Closing, without terminating this Agreement, in which case

Seller shall (A) credit the amount of the applicable insurance deductible against the Purchase Price, and (B) transfer and assign to Purchaser all of Seller's right, title and interest in and to all proceeds from all casualty and lost profits insurance policies maintained by Seller with respect to the Hotel or the Parking Deck, except those proceeds allocable to lost profits for the period prior to the Closing. Purchaser shall make an election under this Section 13.1(a) by giving written notice to Seller on or before ten (10) Business Days after Seller's delivery to Purchaser of written notice of such Casualty. If Purchaser fails to make an election under Section 13.1(a) within such time period, Purchaser shall be conclusively deemed to have elected to proceed to the Closing pursuant to clause (ii) of this Section 13.1(a). If the Closing Date is scheduled to occur within Purchaser's ten (10) day election period, the Closing Date shall be extended until the tenth (10th) day after the expiration of such ten (10) Business Day election period.

(b) Non-Material Casualty. In the event of any (i) Casualty which is not a Material Casualty, or (ii) Material Casualty which is caused by Purchaser or Purchaser's Inspectors, or their respective employees or agents, then Purchaser shall not have the right to terminate this Agreement, but shall proceed to Closing, in which case Seller shall (A) credit the amount of the applicable insurance deductible against the Purchase Price (except if such Casualty is caused by Purchaser or Purchaser's Inspectors), and (B) transfer and assign to Purchaser all of Seller's right, title and interest in and to all proceeds from all casualty and lost profits insurance policies maintained by Seller with respect to the Hotel or the Parking

Deck, except those proceeds allocable to lost profits for the period prior to the Closing.

Section 13.2 Condemnation.

(a) Material Condemnation. If the event of any actual or threatened condemnation or taking pursuant to the power of eminent domain of all or any portion of the Real Property, or any proposed sale in lieu thereof (a "Condemnation"), Seller shall give written notice of such Condemnation to Purchaser as soon as possible after Seller receives notice of such Condemnation. If the Condemnation would (i) result in the loss of more than ten percent (10%) of the Land or Improvements (computed on a square foot basis) or (ii) result in any material reduction or restriction in access to the Land or Improvements (a "Material Condemnation"), then Purchaser shall have the right, in its sole discretion, to (A) terminate this Agreement, in which case Escrow Agent shall refund the Earnest Money to Purchaser and Seller and Purchaser shall have no further rights or obligations under this Agreement, except those which expressly survive such termination, or (B) proceed to Closing, without terminating this Agreement, in which case Seller shall assign to Purchaser all of Seller's right, title and interest in all proceeds and awards from such Condemnation. Purchaser shall make an election under this Section 13.2(a) by giving written notice to Seller within ten (10) Business Days after Seller's delivery to Purchaser of written notice of such Condemnation. If Purchaser fails to make an election under Section 13.2(a) within such time period, Purchaser shall be conclusively deemed to have elected to proceed to Closing pursuant to clause (B) of Section 13.2(a). If the Closing Date is scheduled to occur within Purchaser's ten

(10) Business Day election period, the Closing Date shall be extended until the tenth (10th) day after the expiration of such ten (10) day election period.

(b) Non-Material Condemnation. In the event of any Condemnation of any Real Property other than a Material Condemnation, Purchaser shall not have the right to terminate this Agreement, but shall proceed to Closing, in which case Seller shall assign to Purchaser all of Seller's right, title and interest in all proceeds and awards from such Condemnation.

ARTICLE XIV
INDEMNIFICATION

Section 14.1 Indemnification by Seller. Subject to the limitations set forth in Sections 5.2, 5.3, 5.4, 14.3, 14.4 and 14.5, Seller shall indemnify the Purchaser Indemnitees from and against any Losses incurred (i) after the Closing to the extent resulting from (a) any inaccuracy or untruth of any representations or warranties made by Seller in this Agreement, and (b) the breach by Seller of any of its covenants or obligations under this Agreement which expressly survive the Closing, (ii) after the termination of this Agreement to the extent resulting from the breach by Seller of any of its covenants or obligations under this Agreement which expressly survive such termination, (iii) events, contractual obligations, acts or omissions of Seller that occurred in connection with the ownership of the Property prior to Closing, or (iv) damage to property or injury to or death of any person or any claims for any debt or obligations occurring on or about or in connection with the Property or any portion thereof or with respect to the Property's operations at any time or times prior to

Closing, but specifically excluding (w) any Losses related to covenants of Purchaser which, by the terms of this Agreement, survive Closing, (x) any Losses related to liabilities or obligations for which Purchaser received a credit at Closing (but only to the extent of such credit), (y) any Losses related to liabilities or obligations which Purchaser expressly assumed at Closing and (z) any Losses incurred in relation to the physical condition of the Property (including without limitation, the environmental condition of the Real Property).

Section 14.2 Indemnification by Purchaser. In addition to the Purchaser indemnities set forth elsewhere in this Agreement and subject to the limitations set forth in Sections 6.2 and 14.3, 14.4 and 14.5, Purchaser shall indemnify the Seller Indemnitees from and against any Losses incurred (i) after the Closing to the extent resulting from (a) any inaccuracy or breach of any representations or warranties made by Purchaser in this Agreement, or (b) the breach by Purchaser of any of its covenants or obligations under this Agreement which expressly survive the Closing, (ii) after the termination of this Agreement to the extent resulting from the breach by Purchaser of any of its covenants or obligations under this Agreement which expressly survive such termination, (iii) events, contractual obligations, acts or omissions of Purchaser that occur in connection with the ownership of the Property after Closing, or (iv) damage to property or injury to or death of any person or any claims for any debt or obligations occurring on or about or in connection with the Property or any portion thereof or with respect to the Property's operations at any time or times after Closing, but specifically excluding (w) any Losses related to covenants of Seller which, by

the terms of this Agreement, survive the Closing, (x) any Losses related to liabilities or obligations for which Seller received a credit at the Closing (but only to the extent of such credit), (y) any Losses related to liabilities or obligations which Seller retained at the Closing, and (z) any Losses incurred in relation to the physical condition of the Property (including, without limitation, the environmental condition of the Real Property.

Section 14.3 Limitations on Indemnification Obligations.

(a) Survival of Representations and Warranties. All representations and warranties of Seller and Purchaser under this Agreement shall survive the Closing for a period commencing on the Closing Date and expiring at 5:00 p.m. (Central time) on the date which is six (6) months after the Closing Date (the "Survival Period").

(b) Indemnification Cap. Notwithstanding anything to the contrary in this Agreement, Seller shall not be required to provide indemnification to the Purchaser Indemnitees pursuant to Section 14.1(i)(a) to the extent that the aggregate amount of all Losses incurred by the Purchaser Indemnitees for which Purchaser otherwise would be entitled to indemnification exceeds the amount then existing in the Liquidating Trust (the "Indemnification Cap").

(c) Effect of Insurance. The amount of any Losses for which indemnification is provided to any Indemnitee under this Article XIV shall be net of insurance proceeds received by such Indemnitee in connection with the Indemnification Claim.

Section 14.4 Indemnification Procedure.

(a) Notice of Indemnification Claim. If any of the Seller Indemnitees or Purchaser Indemnitees (as the case may be) (each, an "Indemnitee") is entitled to indemnification under any provision in this Agreement (each, an "Indemnification Claim"), the Party required to provide indemnification to such Indemnitee (the "Indemnitor") shall not be obligated to indemnify Indemnitee until such Indemnitee provides written notice to such Indemnitor of any facts or circumstances on which such Indemnification Claim is based or a Third-Party Claim is made on which such Indemnification Claim is based, describing in reasonable detail such facts and circumstances or Third-Party Claim with respect to such Indemnification Claim. Notwithstanding the foregoing, (i) to the extent any Indemnitee is seeking indemnification for a breach of any representations or warranties, the Indemnitee shall be entitled to indemnification only for those matters as to which the Indemnitee has given written notice to the Indemnitor prior to the expiration of the applicable Survival Period, and (ii) an Indemnitee shall not be entitled to indemnification to the extent such Indemnitee's failure to promptly notify the Indemnitor in accordance with this Section 14.4(a) increases the amount of the indemnification obligation of the Indemnitor or prejudices the Indemnitor's ability to defend against any Third-Party Claim on which such Indemnification Claim is based.

(b) Resolution of Indemnification Claim Not Involving Third-Party Claim. If the Indemnification Claim does not involve a Third-Party Claim and is disputed by the Indemnitor, the dispute shall be

resolved by litigation or other means as the Parties otherwise may agree.

(c) Resolution of Indemnification Claim Involving Third-Party Claim. If the Indemnification Claim involves a Third-Party Claim, the Indemnitor shall have the right (but not the obligation) to assume the defense of such Third-Party Claim, at its cost and expense, and shall use good faith efforts consistent with prudent business judgment to defend such Third-Party Claim, provided that (i) the counsel for the Indemnitor who shall conduct the defense of the Third-Party Claim shall be reasonably satisfactory to the Indemnitee (unless selected by Indemnitor's insurance company), (ii) the Indemnitee, at its cost and expense, may participate in, but shall not control, the defense of such Third-Party Claim, and (iii) the Indemnitor shall not enter into any settlement or other agreement which requires any performance by the Indemnitee, other than the payment of money which shall be paid by the Indemnitor. The Indemnitee shall not enter into any settlement agreement with respect to the Indemnification Claim, without the Indemnitor's prior written consent, which consent may be withheld in Indemnitor's sole discretion. If the Indemnitor elects not to assume the defense of such Third-Party Claim, the Indemnitee shall have the right to retain the defense of such Third-Party Claim and shall use good faith efforts consistent with prudent business judgment to defend such Third-Party Claim in an effective and cost-efficient manner.

(d) Accrual of Indemnification Obligation. Notwithstanding anything to the contrary in this Agreement, the Indemnitee shall have no right to indemnification against the Indemnitor for any

Indemnification Claim which (i) does not involve a Third-Party Claim, but is disputed by Indemnitor, or (ii) which involves a Third-Party Claim, until such time as such dispute or Third-Party Claim is concluded, including any appeals with respect thereto.

Section 14.5 Exclusive Remedy. Except for claims based on fraud the indemnification provisions in this Agreement shall be the sole and exclusive remedy of any Indemnitee with respect to any claim for Losses arising from or in connection with this Agreement.

Section 14.6 Release of Seller for Environmental Liabilities. Notwithstanding any indemnification obligation of Seller under this Agreement, Purchaser does hereby forever release and discharge the Seller Indemnities from any and all Environmental Claims and Environmental Liabilities, whether now known or unknown to Purchaser; provided, however, that such release and discharge shall not apply to any indemnification obligation of Seller under this Agreement, to the extent resulting from a breach of Seller's representation or warranty set forth in Section 5.1(h).

ARTICLE XV
MISCELLANEOUS PROVISIONS

Section 15.1 Notices.

(a) Method of Delivery. All notices, requests, demands and other communications (each, a "Notice") required to be provided to the other Party pursuant to this Agreement shall be in writing and shall be delivered (i) in person, (ii) by certified U.S. mail, with postage prepaid and return receipt requested, (iii) by

overnight courier service, or (iv) by facsimile transmittal, with a verification copy sent on the same day by any of the methods set forth in clauses (i), (ii) and (iii), to the other Party to this Agreement at the following address or facsimile number (or to such other address or facsimile number as Seller or Purchaser may designate from time to time pursuant to Section 15.1(c)):

If to Seller:

RadLAX Gateway Hotel, LLC
RadLAX Gateway Deck, LLC
c/o The Harp Group, Inc.
9501 Technology Boulevard, Suite 401
Rosemont, Illinois 60018
Attn: Mr. Timothy G. Franzen
Fax No.: 630-559-0073

With a copy to:

Perkins Coie LLP
131 South Dearborn Street, Suite 1700
Chicago, Illinois 60603
Attn: David M. Neff, Esq.
Fax No.: 312-324-9689

If to Purchaser:

LAXCSH LLC
c/o Bryan Cave LLP
1290 Avenue of the Americas
New York, NY 10104
Attn: Lawrence P. Gottesman, Esq.
Fax No.: 212-541-1493

With a copy to:

Bryan Cave LLP
1290 Avenue of the Americas
New York, NY 10104
Attn: Ronald B. Emanuel, Esq.
Fax No.: 212-541-1434

(b) Receipt of Notices. All Notices sent by Seller or Purchaser (or their respective counsel pursuant to Section 15.1(d)) under this Agreement shall be deemed to have been received by the Party to whom such Notice is sent upon (i) delivery to the address or facsimile number of the recipient Party, provided that such delivery is made prior to 6:00 p.m. (Central Time for the recipient Party) on a Business Day, otherwise the following Business Day, or (ii) the attempted delivery of such Notice if (A) such recipient Party refuses delivery of such Notice, or (B) such recipient Party is no longer at such address or facsimile number, and such recipient Party failed to provide the sending Party with its current address or facsimile number pursuant to this Section 15.1(c).

(c) Change of Address. Seller and Purchaser and their respective counsel shall have the right to change their respective address and/or facsimile number for the purposes of this Section 15.1 by providing a Notice of such change in address and/or facsimile as required under this Section 15.1(c).

(d) Delivery by Party's Counsel. Seller and Purchaser agree that the attorney for such Party shall have the authority to deliver Notices on such Party's behalf to the other Party hereto.

Section 15.2 Time is of the Essence. Time is of the essence of this Agreement; provided, however, that notwithstanding anything to the contrary in this Agreement, if the time period for the performance of any covenant or obligation, satisfaction of any condition or delivery of any notice or item required under this Agreement shall expire on a day other than a Business Day, such time period shall be extended automatically to the next Business Day.

Section 15.3 Assignment. Purchaser shall not assign this Agreement or any interest therein to any Person, without the prior written consent of Seller, which consent may be withheld in Seller's sole discretion. Notwithstanding the foregoing, the Purchaser may assign this agreement to any Affiliate without Seller's consent, provided such Affiliate shall assume in writing all of the obligations of Purchaser hereunder. No assignment of this Agreement by Purchaser shall relieve Purchaser of its obligations hereunder.

Section 15.4 Successors and Assigns; Third Party Beneficiaries. This Agreement shall be binding upon and inure to the benefit of Seller and Purchaser, and their respective successors and permitted assigns pursuant to Section 15.3. Except for any Indemnitee to the extent such Indemnitee is expressly granted certain rights of defense and indemnification in this Agreement and for any successors and permitted assignee pursuant to Section 15.3, this Agreement shall not confer any rights or remedies upon any third party.

Section 15.5 Prevailing Party. If any litigation or other court action, arbitration or similar adjudicatory

proceeding is sought, taken, instituted or brought by Seller or Purchaser to enforce its rights under this Agreement, all fees, costs and expenses, including, without limitation, reasonable attorneys fees and court costs, of the prevailing Party in such action, suit or proceeding shall be borne by the Party against whose interest the judgment or decision is rendered. This Section 15.5 shall survive the termination of this Agreement and the Closing.

Section 15.6 No Recordation. Neither this Agreement, nor any memorandum or other notice of this Agreement, shall be recorded without Seller's prior written consent, which consent may be withheld in Seller's sole discretion.

Section 15.7 Rules of Construction. The following rules shall apply to the construction and interpretation of this Agreement:

(a) Singular words shall connote the plural as well as the singular, and plural words shall connote the singular as well as the plural, and the masculine shall include the feminine and the neuter.

(b) All references in this Agreement to particular articles, sections, subsections or clauses (whether in upper or lower case) are references to articles, sections, subsections or clauses of this Agreement. All references in this Agreement to particular exhibits or schedules (whether in upper or lower case) are references to the exhibits and schedules attached to this Agreement, unless otherwise expressly stated or clearly apparent from the context of such reference

(c) The headings contained herein are solely for convenience of reference and shall not constitute a part of this Agreement nor shall they affect its meaning, construction or effect.

(d) Each Party hereto and its counsel have reviewed and revised (or requested revisions of) this Agreement and have participated in the preparation of this Agreement, and therefore any usual rules of construction requiring that ambiguities are to be resolved against a particular Party shall not be applicable in the construction and interpretation of this Agreement or any exhibits hereto.

(e) The terms "hereby," "hereof," "hereto," "herein," "hereunder" and any similar terms shall refer to this Agreement, and not solely to the provision in which such term is used.

(f) The terms "include," "including" and similar terms shall be construed as if followed by the phrase "without limitation."

Section 15.8 Governing Law; Severability. This Agreement shall be governed by the laws of the State of Illinois. If any term or provision of this Agreement is held to be or rendered invalid or unenforceable at any time in any jurisdiction, such term or provision shall not affect the validity or enforceability of any other terms or provisions of this Agreement, or the validity or enforceability of such affected terms or provisions at any other time or in any other jurisdiction.

Section 15.9 Recitals, Exhibits and Schedules. The recitals to this Agreement, and all exhibits and

schedules (as amended and supplemented from time to time pursuant to Section 5.3) referred to in this Agreement are incorporated herein by such reference and made a part of this Agreement. Any matter disclosed in any schedule to this Agreement shall be deemed to be incorporated in all other schedules to this Agreement.

Section 15.10 Entire Agreement; Amendments to Agreement. This Agreement sets forth the entire understanding and agreement of the Parties hereto, and shall supersede any other agreements and understandings (written or oral) between Seller and Purchaser on or prior to the date of this Agreement with respect to the transaction contemplated in this Agreement. No amendment or modification to any terms of this Agreement (other than amendments and supplements to the schedules made by Seller pursuant to Section 5.3), or cancellation of this Agreement, shall be valid unless in writing and executed and delivered by Seller and Purchaser.

Section 15.11 Conflicts. In the event of any inconsistency or conflicts between the terms and conditions contained in this Agreement and the terms and conditions contained in the Confirmation Order, the Confirmation Order shall control.

Section 15.12 Facsimile; Counterparts. Seller and Purchaser may deliver executed signature pages to this Agreement by facsimile transmission to the other Party, which facsimile copy shall be deemed to be an original executed signature page; provided, however, that such Party shall deliver an original signature page to the other Party promptly thereafter. This Agreement may be executed in any number of

counterparts, each of which shall be deemed an original and all of which counterparts together shall constitute one agreement with the same effect as if the Parties had signed the same signature page.

[Remainder of page intentionally left blank; Signatures on following pages]

IN WITNESS WHEREOF, Seller and Purchaser have caused this Agreement to be executed in their names by their respective duly authorized officers or representatives.

SELLER:

RADLAX GATEWAY HOTEL, LLC, a Delaware limited liability company

By: RadLAX Gateway Project Management, LLC, an Illinois limited liability company, its Manager

By: Harp Corporate Management, LLC, an Illinois limited liability company, its Manager

By: /s/ Timothy G. Franzen
Name: TIMOTHY G. FRANZEN
Title: Manager

and

RADLAX GATEWAY DECK, LLC, a Delaware limited liability company

By: RadLAX Gateway Project Management, LLC, an Illinois limited liability company, its Manager

By: Harp Corporate Management, LLC, an Illinois limited liability company, its Manager

By: /s/ Timothy G. Franzen
Name: TIMOTHY G. FRANZEN
Title: Manager

[SIGNATURE PAGE TO HOTEL ASSET PURCHASE AND SALE AGREEMENT]

PURCHASER:

LAXCSH LLC, a Delaware limited liability company

By: /s/ Steven Orbuch
Name: Steven Orbuch
Title: Authorized Person

EXHIBIT A
TO
HOTEL ASSET PURCHASE
AND SALE AGREEMENT

FORM OF
EARNEST MONEY ESCROW AGREEMENT

30 North LaSalle Street, Suite 310,
Chicago, Illinois 60602
(312) 553-0471 (800) 333-3993 (Fax) 553-0480

Escrow Number: _____ Date: _____

STRICT JOINT ORDER ESCROW

Property Address: Radisson LAX
6225 W. Century Blvd.
Los Angeles, CA 90045

Deposit: $2,750,000.00

Initial Deposit of TWO MILLION SEVEN HUNDRED FIFTY THOUSAND AND NO/100 DOLLARS ($2,750,000.00) is hereby deposited with First American Title Insurance Company (**"Escrowee"**) into this Strict Joint Order Escrow (**"Agreement"**) and shall be released and delivered by Escrowee only upon the joint written order of the undersigned or their respective legal representatives or assigns.

ESCROWEE, is hereby expressly authorized to disregard, in its sole discretion, any and all unilateral notices or warnings given by any of the parties hereto, or by any other person or corporation, but said ESCROWEE is hereby expressly authorized to regard

and to comply with and obey any and all orders, judgments or decrees entered or issued by any court with or without jurisdiction, and in case the said ESCROWEE obeys or complies with any such order, judgment or decree of any court it shall not be liable to any of the parties hereto or any other person, firm or corporation by reason of such compliance, notwithstanding any such order, judgment or decree being entered without jurisdiction or being subsequently reversed, modified, annulled, set aside or vacated. In case of any suit or proceeding regarding this escrow, to which said ESCROWEE is or may at any time become a party, it shall have a lien on the contents hereof for any and all costs, and reasonable attorneys' fees, whether such attorneys shall be regularly retained or specially employed, and any other expenses which it may have incurred or become liable for on account thereof, and it shall be entitled to reimburse itself therefore out of said deposit, and the undersigned jointly and severally agree to pay said ESCROWEE upon demand all such costs, fees and expenses so incurred, to the extent the funds deposited hereunder shall be insufficient to allow for such reimbursement.

In no case shall the above mentioned deposits be surrendered except on an order signed by the parties hereto, their respective legal representatives or assigns, or in obedience of the process or order of court as aforesaid.

Deposits made pursuant to these instructions may be invested on behalf of any party or parties thereto: Provided, that any direction to ESCROWEE for such investment shall be expressed in writing by one of the parties to this Agreement, and further provided that

Escrowee is in receipt of the requisite taxpayer's identification number and investment forms. ESCROWEE will, upon request furnish information concerning its procedures and fee schedules for investment.

Billing Instructions:
Escrow fee will be billed as follows: $_____ payable upon opening of escrow each party shall severally be responsible for one-half (1/2) of such fee.

Except as to deposits of funds for which ESCROWEE has received express written direction concerning investment to other handling, the parties hereto agree the ESCROWEE shall be under no duty to invest or reinvest any cash at any time held by it hereunder. The ESCROWEE shall have the full right, power and authority to commingle any and all cash at any time constituting said deposit or part thereof with its other Escrow funds and all income, if any, derived from any use which the ESCROWEE may make of any deposits hereunder shall belong to the ESCROWEE.

In the event the ESCROWEE is requested to invest deposits hereunder, ESCROWEE is not to be held responsible for any loss of principal or interest which may be incurred as a result of making the investments or redeeming said investment for the purposes of this Agreement.

SELLER:

RADLAX GATEWAY HOTEL, LLC, a Delaware limited liability company

By: RadLAX Gateway Project Management, LLC, a Delaware limited liability company, its Manager

By: Harp Corporate Management, LLC, an Illinois limited liability company, its Manager

By:_____
Name:_____
Title: Manager

and

RADLAX GATEWAY DECK, LLC, a Delaware limited liability company

By: RadLAX Gateway Project Management, LLC, a Delaware limited liability company, its Manager

By: Harp Corporate Management, LLC, an Illinois limited liability company, its Manager

By:_____
Name:_____
Title: Manager

PURCHASER:

LAXCSH LLC, a Delaware limited liability company

By:_____
Name: Steven Orbuch
Title: Authorized Person

ACCEPTED:

FIRST AMERICAN TITLE INSURANCE COMPANY, LLC

By: _____

EXHIBIT B
TO
HOTEL ASSET PURCHASE AND SALE AGREEMENT

FORM OF
GRANT DEED

RECORDING REQUESTED BY:
Steven F. Ginsberg, Esq.
Ginsberg Jacobs LLP
300 S. Wacker Drive, Suite 2450
Chicago, Illinois 60606

AFTER RECORDING MAIL TO:
Steven F. Ginsberg, Esq.
Ginsberg Jacobs LLP
300 S. Wacker Drive, Suite 2450
Chicago, Illinois 60606

MAIL TAX STATEMENTS TO:
LAXCSH LLC
c/o _____
_____
_____

APN: 4124-026-004 and 4124-026-005

GRANT DEED

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged,

[RadLAX Gateway Hotel, LLC] [RadLAX Gateway Deck, LLC], a Delaware limited liability company ("**Grantor**")

hereby grants to

LAXCSH LLC, a Delaware limited liability company

the real property (the "**Property**") in the City of Los Angeles, County of Los Angeles, State of California described as set forth in **Exhibit A** attached hereto and incorporated herein by this reference.

The Property is conveyed by Grantor subject to those matters set for in **Exhibit B** attached hereto and incorporated herein by this reference.

Mail Tax Statements to:
Same address as above

IN WITNESS WHEREOF, the Grantor has executed this Grant Deed as of the __ day of _____, 20___.

[RADLAX GATEWAY HOTEL, LLC][RADLAX GATEWAY DECK, LLC], a Delaware limited liability company

By: RadLAX Gateway Project Management, LLC, a Delaware limited liability company, its Manager

By: Harp Corporate Management, LLC, an Illinois limited liability company, its Manager

By:_____
Name:_____
Title:_____Manager_____

[insert California all-purpose acknowledgment]

Exhibit A
to
Grant Deed

Legal Description

Exhibit B
to
Grant Deed

Permitted Exceptions

EXHIBIT C
TO
HOTEL ASSET PURCHASE
AND SALE AGREEMENT

FORM OF
BILL OF SALE

BILL OF SALE

[RADLAX GATEWAY HOTEL, LLC][RADLAX GATEWAY DECK, LLC], a Delaware limited liability company ("**Seller**"), in consideration of Ten And No/100 Dollars ($10.00), receipt whereof is hereby acknowledged, does hereby sell, assign, transfer and set over to LAXCSH, LLC, a Delaware limited liability company ("**Purchaser**"), all of the FF&E, Supplies, Attic Stock, F&B, Retail Merchandise and Accounts Receivable (as such terms are defined in that certain Hotel Asset Purchase and Sale Agreement dated as of _____, 20__ by and between Seller and Purchaser related to the Radisson LAX Hotel and adjacent parking deck) subject in all respects to the terms, limitations and conditions contained in said Hotel Asset Purchase and Sale Agreement. ALL WARRANTIES OF QUALITY, FITNESS, AND MERCHANTABILITY ARE HEREBY EXCLUDED.

IN WITNESS WHEREOF, Seller has signed and sealed this Bill of Sale this ____ day of ____, 20___.

[RADLAX GATEWAY HOTEL, LLC][RADLAX GATEWAY DECK, LLC], a Delaware limited liability company

By: RadLAX Gateway Project Management, LLC, a Delaware limited liability company, its Manager

By: Harp Corporate Management, LLC, an Illinois limited liability company, its Manager

By:_____
Name:_____
Title: Manager

EXHIBIT D
TO
HOTEL ASSET PURCHASE AND SALE AGREEMENT

FORM OF
ASSIGNMENT AND ASSUMPTION OF LEASES AND CONTRACTS

ASSIGNMENT AND ASSUMPTION OF LEASES AND CONTRACTS

THIS ASSIGNMENT AND ASSUMPTION OF LEASES AND CONTRACTS (the "**Assignment**"), is made by and between [RADLAX GATEWAY HOTEL, LLC][RADLAX GATEWAY DECK, LLC], a Delaware limited liability company ("**Assignor**") and LAXCSH LLC, a Delaware limited liability company ("**Assignee**").

RECITALS:

WHEREAS, Assignor and Assignee entered into that certain Hotel Asset Purchase and Sale Agreement effective as of _____, 20____ (the "**Sale Agreement**"), for the purchase and sale of certain assets located in Los Angeles, California, as more particularly described therein (the "**Property**"); and

WHEREAS, the Sale Agreement provides, *inter alia*, that Assignor shall assign to Assignee the Tenant Leases and the Contracts (as such terms are defined in the Sale Agreement).

WITNESSETH:

NOW, THEREFORE, in consideration of the promises and the mutual covenants herein contained, the parties hereto hereby agree as follows:

1. Assignment of Tenant Leases and Contracts. Assignor hereby assigns, sets over and transfers to Assignee all of its right, title and interest, if any, in, to and under such of the Tenant Leases and the Contracts as are set forth on **Exhibit A** attached hereto and made a part hereof.

2. Assumption. Assignee hereby assumes all liabilities and obligations of Assignor under such of the Tenant Leases and the Contracts as are set forth on **Exhibit A** attached hereto, but only to the extent accruing from and after the date hereof.

3. Counterparts. This Assignment may be executed in counterparts, each of which shall be an original and all of which counterparts taken together shall constitute one and the same agreement. Facsimile executions shall be legally binding.

4. Capitalized Terms. Any capitalized terms not otherwise defined herein shall have the same meaning in this Assignment as defined in the Sale Agreement.

5. Miscellaneous. This Assignment and the obligations of the parties hereunder shall survive the closing of the transaction referred to in the Sale Agreement, shall be binding upon and inure to the benefit of the parties hereto, their respective legal representatives, successors and assigns, shall be governed by and construed in accordance with the laws

of the State of Illinois applicable to agreements made and to be wholly performed within said State and may not be modified or amended in any manner other than by a written agreement signed by the party to be charged therewith.

6. Indemnities. Subject to the limitations of Sections 6.2, 14.3, 14.4 and 14.5 of the Sale Agreement, Assignee hereby agrees to indemnify, defend and hold Assignor harmless from any and all damages, losses, costs, claims, liabilities, expenses, demands and obligations under or with respect to such of the Tenant Leases and the Contracts as are set forth on **Exhibit A** (collectively, the "**Losses**"), to the extent arising or accruing on or after the date hereof, together with any and all Losses relating to security deposits under such of the Tenant Leases as are set forth on **Exhibit A** or any other item relating to such of the Tenant Leases or the Contracts as are set forth on **Exhibit A** for which and to the extent that Assignee received a credit on the Closing Date (a "**Credit Item**") regardless of when such Losses arise or accrue. Subject to the limitations of Sections 5.2, 5.3, 5.4, 14.3, 14.4 and 14.5 of the Sale Agreement, Assignor hereby agrees to indemnify, defend, and hold Assignee harmless from any and all Losses under or with respect to such of the Tenant Leases and the Contracts as are set forth on **Exhibit A** to the extent arising or accruing prior to the date hereof, other than any Credit Items.

IN WITNESS WHEREOF, Assignor and Assignee have signed and sealed this Assignment this ____ day of _____, 20___.

ASSIGNOR:

[RADLAX GATEWAY HOTEL, LLC][RADLAX GATEWAY DECK, LLC], a Delaware limited liability company

By: RadLAX Gateway Project Management, LLC, a Delaware limited liability company, its Manager

By: Harp Corporate Management, LLC, an Illinois limited liability company, its Manager

By:_____
Name:_____
Title: Manager

ASSIGNEE:

LAXCSH LLC, a Delaware limited liability company

By:_____
Name: Steven Orbuch
Title: Authorized Person

Exhibit A
to
Assignment and Assumption
of Leases and Contracts

Tenant Leases

Contracts

EXHIBIT E
TO
HOTEL ASSET PURCHASE AND SALE AGREEMENT

FORM OF GENERAL ASSIGNMENT AND ASSUMPTION AGREEMENT

GENERAL ASSIGNMENT AND ASSUMPTION AGREEMENT

THIS GENERAL ASSIGNMENT AND ASSUMPTION AGREEMENT (the "**Assignment**"), is made by and between [RADLAX GATEWAY HOTEL, LLC][RADLAX GATEWAY DECK, LLC], a Delaware limited liability company ("**Assignor**") and LAXCSH LLC, a Delaware limited liability company ("**Assignee**").

RECITALS:

WHEREAS, Assignor and Assignee entered into that certain Hotel Asset Purchase and Sale Agreement effective as of _____, 20____ (the "**Sale Agreement**"), for the purchase and sale of certain assets located in Los Angeles, California, as more particularly described therein (the "**Property**"); and

WHEREAS, the Sale Agreement provides, *inter alia*, that Assignor shall assign to Assignee the Intangible Property, the Licenses and Permits and the Bookings (as such terms are defined in the Sale Agreement).

WITNESSETH:

NOW, THEREFORE, in consideration of the promises and the mutual covenants herein contained, the parties hereto hereby agree as follows:

1. Assignment of Intangible Property, Licenses and Permits and Bookings. Assignor hereby assigns, sets over and transfers to Assignee all of its right, title and interest, if any, in, to and under the Intangible Property, the Licenses and Permits and the Bookings.

2. Assumption. Assignee hereby assumes all liabilities and obligations of Assignor in connection with the Intangible Property, the Licenses and Permits and the Bookings, but only to the extent accruing from and after the date hereof.

3. Counterparts. This Assignment may be executed in counterparts, each of which shall be an original and all of which counterparts taken together shall constitute one and the same agreement. Facsimile executions shall be legally binding.

4. Capitalized Terms. Any capitalized terms not otherwise defined herein shall have the same meaning in this Assignment as defined in the Sale Agreement.

5. Miscellaneous. This Assignment and the obligations of the parties hereunder shall survive the closing of the transaction referred to in the Sale Agreement, shall be binding upon and inure to the benefit of the parties hereto, their respective legal representatives, successors and assigns, shall be governed by and construed in accordance with the laws of the State of Rhode Island applicable to agreements

made and to be wholly performed within said State and may not be modified or amended in any manner other than by a written agreement signed by the party to be charged therewith.

6. Indemnities. Subject to the limitations of Sections 6.2, 14.3, 14.4 and 14.5 of the Sale Agreement, Assignee hereby agrees to indemnify, defend and hold Assignor harmless from any and all damages, losses, costs, claims, liabilities, expenses, demands and obligations under or with respect to the Intangible Property, the Licenses and Permits and the Bookings (collectively, the "**Losses**"), to the extent arising or accruing after the date hereof, together with any other item relating to the Intangible Property, the Licenses and Permits and the Bookings for which and to the extent that Assignee received a credit on the Closing Date (a "**Credit Item**") regardless of when such Losses arise or accrue. Subject to the limitations of Sections 5.2, 5.3, 5.4, 14.3, 14.4 and 14.5 of the Sale Agreement, Assignor hereby agrees to indemnify, defend, and hold Assignee harmless from any and all Losses under or with respect to the Intangible Property, the Licenses and Permits and the Bookings to the extent arising or accruing prior to the date hereof, other than any Credit Items.

IN WITNESS WHEREOF, Assignor and Assignee have signed and sealed this Assignment this ____ day of _____, 20___.

ASSIGNOR:

[RADLAX GATEWAY HOTEL, LLC][RADLAX GATEWAY DECK, LLC], a Delaware limited liability company

By: RadLAX Gateway Project Management, LLC, a Delaware limited liability company, its Manager

By: Harp Corporate Management, LLC, an Illinois limited liability company, its Manager

By:_____
Name:_____
Title: Manager

ASSIGNEE:

LAXCSH LLC, a Delaware limited liability company

By:_____
Name: Steven Orbuch
Title: Authorized Person

EXHIBIT F
TO
HOTEL ASSET PURCHASE AND SALE AGREEMENT

FORM OF INTERIM LIQUOR MANAGEMENT AGREEMENT

INTERIM LIQUOR MANAGEMENT AGREEMENT

THIS INTERIM LIQUOR MANAGEMENT AGREEMENT (this "**Agreement**") is entered into as of the ____ day of _____, 20___, by and between RADLAX GATEWAY HOTEL, LLC, a Delaware limited liability company ("**Manager**"), and LAXCSH LLC, a Delaware limited liability company ("**Owner**").

RECITALS:

A. As of the date hereof, in accordance with the terms of that certain Hotel Asset Purchase and Sale Agreement dated as of _____, 20___ by and between Manager, as seller, and Owner (as may be amended from time to time, the "**Contract**"), Manager sold to Owner the property and business commonly known as the Radisson Hotel at Los Angeles International Airport in Los Angeles, California (the "**Hotel**").

B. Owner or its designee intends to promptly apply for all requisite federal, state and local licenses for the service of alcoholic beverages, entertainment, food service, and other incidental services at the Hotel (the "**Requisite Licenses**").

C. As of the date hereof, all of the Requisite Licenses have not been issued to Owner or its designee.

D. Manager possesses all of the Requisite Licenses and has previously managed and operated the Hotel in accordance with applicable laws.

E. In order to facilitate the smooth and orderly transition of ownership and operation of the Hotel, Owner desires to retain Manager to operate the service and sale of alcoholic beverages under the Requisite Licenses on the terms set forth below.

F. Manager desires to accept said appointment on the terms and conditions set forth below.

WITNESSETH:

NOW THEREFORE, in consideration of the purchase and sale of the Hotel, the mutual agreements, promises and covenants contained herein and in furtherance of the duties and obligations set forth in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by all parties hereto, the parties hereby agree as follows:

1. Recitals. The recitals stated above are hereby incorporated into and made a material part of this Agreement.

2. Appointment. Owner hereby appoints Manager to act as its agent for the limited purpose of conducting the activities for which Manager holds valid state, county, and municipal licenses until Owner

obtains the Requisite Licenses, including, without limitation, continuing the service and sale of alcoholic beverages and related licensed activities on those portions of the Hotel used for such purpose. Manager hereby accepts the foregoing appointment. To the extent required by law, Manager shall have sole and unqualified control with respect to the sale and service of alcoholic beverages and related licensed activities in the Hotel.

3. Manager's Duties. During the term of this Agreement, Manager shall maintain the Requisite Licenses in full force and effect and shall take no action which may result in the termination, suspension or cancellation of the Requisite Licenses. Manager may engage Owner's hotel operator to manage the employees of Owner in the service and sale of alcoholic beverages and other activities covered by the Requisite Licenses. To the extent permitted by law, Manager shall perform its management duties under the direction of Owner. Notwithstanding anything to the contrary contained herein, Manager shall not be required to use its own funds in the fulfillment of its duties and obligations under this Agreement.

4. Delegation of Duties. To the greatest extent permitted by law, Manager hereby delegates all management duties hereunder to Owner or as directed by Owner to Owner's hotel operator, which delegation may not be refused by Owner or any such operator unless Owner or such operator delivers an opinion rendered by a lawyer licensed in California opining that such delegation would cause the revocation or termination of one or more of the Requisite Licenses.

5. Owner's Duties. Owner shall provide adequate staff for the service and sale of alcoholic beverages under Manager's supervision and the other activities covered by the Requisite Licenses. Owner shall maintain an adequate supply of inventory and equipment to enable Manager to perform its duties hereunder. Owner or its designee shall promptly apply for all Requisite Licenses and diligently continue the license application process until Owner or its designee has obtained all of the Requisite Licenses.

6. Limitations on Manager. Manager shall not be able to hire, fire, or discipline employees of Owner or its designee, it being understood that Manager's only responsibility with respect to the employees of Owner or its designee is the supervision of such employees in connection with the service and sale of alcoholic beverages and the other activities covered by the Requisite Licenses. Manager shall not be entitled to order supplies, inventory or equipment, or otherwise expend any money or incur any debt on behalf of Owner without the prior written consent of Owner.

7. Term. The term of this Agreement shall commence on the date hereof and terminate upon two (2) days advance written notice to Manager; provided that Owner shall terminate this Agreement upon two (2) days advance written notice to Manager once Owner has obtained the Requisite Licenses. Upon the termination of this Agreement, Manager shall be released from any future liability, obligation or expense relating to the agency created by this Agreement.

8. Management Fee. Manager shall receive no compensation for its services under this Agreement,

such compensation being included in the consideration paid for the Hotel pursuant to the Contract.

9. Assignment. Neither Owner nor Manager may assign or otherwise transfer any right, title or interest in this Agreement or otherwise delegate any duty under this Agreement (except as set forth in Paragraph 4 hereof) without the prior written consent of the other party.

10. Compliance with Law. Owner and Manager shall comply with all governmental laws, ordinances, rules and regulations applicable to the sale and service of alcoholic beverages and the provision of licensed services. Manager shall not take any action which Manager knows will violate any laws, ordinances, rules or regulations applicable to the sale and service of alcoholic beverages or any other activity covered by the Requisite Licenses.

11. Insurance. During the term of this Agreement, Owner shall, at its expense, keep in force and effect at all times during the term of this Agreement, adequate public liability and "dram shop" insurance policies of insurance, in amounts and with companies reasonably acceptable to Manager, and in no event less than amounts maintained by Manager during its ownership and/or operation of the Hotel immediately prior to the date hereof. Such policies of insurance shall afford protection to Manager, Owner, the hotel operator, and their respective agents and employees. During the term of this Agreement, Owner shall also name Manager as an additional insured on the liability insurance policy for the Hotel, and shall, upon written request of Manager, provide Manager with reasonable

documentary evidence of Owner's compliance with this Paragraph 11.

12. Captions. The captions or headings of paragraphs in this Agreement are inserted for convenience only, and shall not serve to alter, limit, expand or otherwise modify any of the terms and provisions contained herein.

13. Successors. Subject to the restrictions on assignment contained in Paragraph 9 above, this Agreement shall apply to, inure to the benefit of, and be binding upon, the parties hereto and their respective successors-in-interest and legal representatives except as otherwise expressly provided herein.

14. Indemnification and Hold Harmless. Except as a result of the gross negligence or intentional misconduct of Manager, its agents, employees, and contractors (other than Owner and its affiliates), Owner shall indemnify, defend and hold Manager harmless from and against any and all claims, losses, causes of action, costs and expenses (including, but not limited to, reasonable attorneys' fees incurred in enforcing the terms of this Paragraph 14) damages, penalties, fines or liabilities incurred or arising out of, or connected to, the performance of Manager's duties and obligations under this Agreement.

15. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

16. Entire Agreement. This Agreement constitutes the entire Agreement between the parties hereto and supersedes and terminates all prior oral and written agreements and understandings among the parties. No amendment, alteration, modification of, or addition to this Agreement will be valid and binding unless expressed in writing and signed by the parties hereto.

17. Governing Law. This Agreement shall be governed by and construed and interpreted in accordance with the laws of the State of California, without regard to principles of conflicts of law.

18. Facsimile Signatures. A copy of this Agreement, if executed and transmitted by facsimile or electronic means shall be deemed in all manners and respects to be an original document and any signature thereon shall be deemed an original and shall have the same binding legal effect as an original executed copy of this Agreement.

IN WITNESS WHEREOF, the parties have hereunto set their hands as of the day and year first written above.

MANAGER:

RADLAX GATEWAY HOTEL, LLC, a Delaware limited liability company

By: RadLAX Gateway Project Management, LLC, a Delaware limited liability company, its Manager

By: Harp Corporate Management, LLC, its Manager

By:_____
Name:_____
Its:_____Manager_____.

OWNER:

LAXCSH LLC, a Delaware limited liability company

By:_____
Name: Steven Orbuch_____.
Its:___Authorized Person____.

Schedule 2.1(a) – Legal Description of Land

HOTEL PARCEL

THE LAND REFERRED TO HEREIN BELOW IS SITUATED IN THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, AND IS DESCRIBED AS FOLLOWS:

THOSE PORTIONS OF LOTS 14 AND 15 OF TRACT 12365, IN THE CITY OF LOS ANGELES, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, AS PER MAP RECORDED IN BOOK 238 PAGES 49 AND 50 OF MAPS, IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY, AND THAT PORTION OF THE SOUTHWEST QUARTER OF SECTION 31, TOWNSHIP 2 SOUTH, RANGE 14 WEST, RANCHO SAUSAL REDONDO, AS PER MAP RECORDED IN BOOK 1 PAGES 507 AND 508 OF PATENTS RECORDS OF SAID COUNTY, DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT IN THE WESTERLY LINE OF SAID LOT 14 DISTANT THEREON SOUTH 0° 00' 58" WEST 95.00 FEED FROM THE NORTHWEST CORNER OF SAID LOT; THENCE PARALLEL WITH THE LINE COMMON TO SAID LOTS 14 AND 15, SOUTH 89° 56'39" EAST 234.33 FEET; THENCE PARALLEL WITH THE WESTERLY LINES OF SAID LOTS 14 AND 15 SOUTH 0° 00' 58" WEST, 163.17 FEET; THENCE SOUTH 89° 56' 39" EAST, 18.00FEET; THENCE SOUTH 0° 03' 21" WEST 18.00 FEET; THENCE SOUTH 89° 56' 39" EAST 269.95 FEET TO THE EASTERLY LINE OF SAID LOT 14; THENCE ALONG THE EASTERLY LINE OF

SAID LOT 14 AND THE SOUTHERLY PROLONGATION THEREOF SOUTH 0° 00' 58" WEST 317.83 FEET, MORE OR LESS, TO THE NORTHERLY LINE OF CENTURY BOULEVARD, 40 FEET WIDE AS DESCRIBED IN DEED RECORDED IN BOOK 4085 PAGE 6 OF DEEDS, RECORDS OF SAID COUNTY; THENCE ALONG SAID NORTHERLY LINE NORTH 89° 56' 39" WEST 610.00 FEET TO THE EASTERLY LINE OF SEPULVEDA BOULEVARD, 100 FEET WIDE, AS DESCRIBED IN DEED RECORDED IN BOOK 14325 PAGE 77, OFFICIAL RECORDS OF SAID COUNTY; THENCE ALONG SAID EASTERLY LINE NORTH 0° 00' 58" EAST 545.00 FEET TO A LINE WHICH BEARS NORTH 89° 56' 39" WEST AND PASSES THROUGH THE POINT OF BEGINNING; THENCE SOUTH 89° 56' 39" EAST 10.00 FEET TO THE POINT OF BEGINNING.

EXCEPT AN UNDIVIDED 50 PERCENT INTEREST IN AND TO ALL THE OIL, GAS, MINERALS AND OTHER HYDROCARBON SUBSTANCES BELOW A DEPTH OF 500 FEET, MEASURED VERTICALLY FROM THE SURFACE OF SAID LAND WITHOUT THE RIGHT TO ENTER UPON OR USE THE SURFACE THEREOF, AS RESERVED BY TOWCRAT CORP ., A NEVADA CORPORATION IN DEED RECORDED AUGUST 23, 1967 AS INSTRUMENT NO. 1000, IN BOOK D3744 PAGE 488 OFFICIAL RECORDS.

SAID LAND IS SHOWN AS PROPOSED **PARCEL TWO** OF THE CONDITIONAL CERTIFICATE OF COMPLIANCE FOR LOT-LINE ADJUSTMENT, RECORDED DECEMBER 14, 2001 AS INSTRUMENT NO. 01-2400303.

Schedule 2.1(a) – Legal Description of Land

(continued)

DECK PARCEL

THE LAND REFERRED TO HEREIN BELOW IS SITUATED IN THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, AND IS DESCRIBED AS FOLLOWS:

THOSE PORTIONS OF LOTS 14 AND 15 OF TRACT 12365, IN THE CITY OF LOS ANGELES, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, AS PER MAP RECORDED IN BOOK 238 PAGES 49 AND 50 OF MAPS, IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY, AND THAT PORTION OF THE SOUTHWEST QUARTER OF SECTION 31, TOWNSHIP 2 SOUTH, RANGE 14 WEST, SAN BERNARDINO MERIDIAN, RANCHO SAUSAL REDONDO, AS PER MAP RECORDED IN BOOK 1 PAGES 507 AND 508 OF PATENTS, IN THE OFFICE OF SAID COUNTY, RECORDED, DESCRIBED AS FOLLOWS:

BEGINNING AT THE NORTHWEST CORNER OF SAID LOT 14; THENCE ALONG THE WESTERLY LINE OF SAID LOT SOUTH 0° 00' 58" WEST 95.00 FEET; THENCE PARALLEL WITH THE LINE COMMON TO SAID LOTS 14 AND 15 SOUTH 89° 56' 39" EAST 234.33 FEET TO THE TRUE POINT OF BEGINNING OF THIS DESCRIPTION; THENCE PARALLEL WITH THE WESTERLY LINES OF SAID LOTS 14 AND 15, SOUTH 0° 00' 58" WEST 163.17 FEET; THENCE SOUTH 89° 56' 39" EAST, 84.76 FEET; THENCE SOUTH 0° 03' 21" WEST, 46.00

FEET; THENCE SOUTH 89° 56' 39" EAST 18.00 FEET; THENCE SOUTH 0° 03' 21" WEST, 18.00 FEET; THENCE SOUTH 89° 56' 39" EAST, 262.95 FEET TO THE EASTERLY LINE OF SAID LOT 14; THENCE ALONG THE EASTERLY LINES OF SAID LOTS 14 AND 15 NORTH 0° 00' 58" EAST 372.17 FEET TO A LINE THAT IS PARALLEL WITH AND DISTANT NORTHERLY 50.00 FEET MEASURED AT RIGHT ANGLES FROM THE SOUTHERLY LINE OF SAID LOT 15; THENCE ALONG SAID PARALLEL LINE NORTH 89° 56' 39" WEST 365.67 FEET TO A LINE THAT IS PARALLEL WITH THE WESTERLY LINES OF SAID LOTS 14 AND 15 AND BEARS NORTH O° 00' 58" EAST FROM THE TRUE POINT OF BEGINNING; THENCE SOUTH O° 00' 58" WEST, 145.00 FEET ALONG SAID PARALLEL LINE TO THE TRUE POINT OF BEGINNING.

EXCEPT AN UNDIVIDED 50 PERCENT INTEREST IN AND TO ALL THE OIL, GAS, MINERALS AND OTHER HYDROCARBON SUBSTANCES BELOW A DEPTH OF 500 FEET, MEASURED VERTICALLY FROM THE SURFACE OF SAID LAND WITHOUT THE RIGHT TO ENTER UPON OR USE THE SURFACE THEREOF, AS RESERVED BY TOWCRAT CORP., A NEVADA CORPORATION IN DEED RECORDED AUGUST 23, 1967 AS INSTRUMENT NO. 1000, IN BOOK D3744 PAGE 488 OFFICIAL RECORDS.

SAID LAND IS SHOWN AS PROPOSED **PARCEL ONE** OF THE CONDITIONAL CERTIFICATE OF COMPLIANCE FOR LOT-LINE ADJUSTMENT, RECORDED DECEMBER 14, 2001 AS INSTRUMENT NO. 01-2400303.

Schedule 2.1(i) - Tenant Leases

Account Name	Address, City, State Zip				Contract Type
Andy Chan Cosmetology	6225 West Century Blvd	Los Angeles	CA	90045	Space Lease - Debtor is Lessor
CDS Gift Shop	6225 West Century Blvd	Los Angeles	CA	90045	Space Lease - Debtor is Lessor
Marquise Fine Jewelry	19533 Runnymeade Street	Winnetka	CA	91335	Space Lease - Debtor is Lessor
Midway	4751 Wilshire Blvd. Suite 120	Los Angeles	CA	90010	Space Lease - Debtor is Lessor (as of 1/1/2011 on a month to month)
Sky Tel Corp./(aka Mobilcom)	515 E. Amite Street	Jackson	MS	39201	Space Lease - Debtor is Lessor
Think Media	2537 N. Ontario St.	Burbank	CA	91504	Space Lease - Debtor is Lessor (as of 06/02/10 month to month)

Account Name	Address, City, State Zip				Contract Type
Union Bank Leasing, Inc.	921 Walnut Street Suite 220	Boulder	CO	80302	Equipment Lease - (Wireless Internet)
Pro Data	2152 Michelson Ave.	Irvine	CA	92612	Equipment Lease - (Two copiers)

Schedule 2.1(j) - Equipment Leases

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Schedule 2.1(k) - Operating Agreements

Radlax Gateway Hotel, LLC

Operating Contracts

Account Name	**Description**
On Command/Lodgenet	Guest Room Movies/Satallite TV Contract
Destination Shuttle	Guest Transportation Contract - Group LAX Cooridor
Radiant	Guest/Banquet/Room Linen outsource Contract
Go Concierges	Guest/Maint. Tracking Contract
Psav Presentation Service	On site AV provider Contract
Los Angeles World Airport	Parking Structure Use Permit Contract
Muzak	Public Area TV and Music Contract
Portfolio Hotels and Resorts	Management Contract
Creative	Asset Management Contract
Radisson Hotels International, Inc.	Franchise Agreement

Billing Term	Amount	Contract Term
Monthly	$6320.45 avg. offset with Commissions	Month to Month
Monthly	Varies by Passanger Count Base $57,000	5 Year - Auto Renewal
Monthly	1.98 per lb. non special	1 Year Renew Upon Payment
Monthly	$395.00	1 Year Renew Upon Payment
Monthly	Monthly Commission	5 Year Renew Upon Payment
Monthly	$24,000.00	Terminated as of 8/17/2009
Monthly	$641.34	Month to Month
Monthly	3% Gross Revenue	5 Years - November 2012
Monthly	.5% Gross Revnue	5 Years - November 2012
Monthly	1.8% Room Rev. Marketing Fee, 1.8% Room Revenue	December 31, 2027

Quality Security	Security Services Contract
SoCal Uniform Rental	Uniform Rental Contract
Quality Parking	Valet Management Contract

Maintenance Contracts

Account Name	**Description**
Browns Green Thumb	Landscaping Contract
Cal Air	Environmental Testing
Excel Elevator	Elevator Maintenance
TechnoFit	Gym Equiptment Preventative Maintenance
Kone	Elevator Maintenance
M3	Accounting Software
Go Concierge	Guest Tracking and Guest Service Software

	Reservation Fee; 3.25% Room Revenue Royalty Fee	December 31, 2027
Monthly	$15,000.00	1 Year Renew Upon Payment
Monthly	$65.11	1 Year Renew Upon Payment
Monthly	$14 per hour Monthly Varies on Vollumn Avg. $55,000.	1 Year Renew Upon Payment

Billing Term	**Amount**	**Contract Term**
Monthly	$1,795.00	Termindated 8/1/2010
Monthly	$290.00	Monthly or buy out lease
Monthly	$4,000.00	Terminated - Kone purchased Excel
Monthly	$195.90	Monthly
Monthly	$4,398.40	Monthly from Excel Contract
Monthly	$300.00	Monthly
Monthly	$395.00	Monthly

Sprint/Nextel Wireless	Cellphone and Radio
ATT Wireless	Cellphone and Radio
Pro Star Mechanical Services, Inc.	Boiler Service Contract
Isotech Pest Management	Pest Management
Meeting Matrix	Software Support
Tri-Chem Technology, Corp.	Hotel Water Treatment Contract
Waste Management	Waste Services Contract
Delphi/New Market	GRC Maintenance
Micros PMS	Property Management System (Service and Support)

Equipment Leases

Account Name	**Description**
Marlin Leasing	Equipment Lease - Micros (buy out option available)
Union Bank Leasing, Inc.	Equipment Lease - (Wireless Internet)
Pro Data	Copier Maintenance and Lease Sharp (2 Copiers)

Monthly	$4,743.24	1 Year Renew upon Payment
Monthly	$1,200.00	Average
Monthly	$0.00	Terminated
Monthly	$1,370.00	Month to Month
Monthly	$300.00	1 Year Renew Upon Payment
Monthly	$645.00	Month to Month
Monthly	$2,500.00	Average
Annual	$9,117.50	1 Year Renew Upon Payment
Quarterly	$7,362.00	1 Year Renew Upon Payment

Billing Term	**Amount**	**Contract Term**
Monthly	$1,194.08	Done with lease as of 12.31.10
Monthly	$2,455.11	24 Month
Monthly	$1,155.00	Yearly (July 2010 - July 2011)

Internet/Phone

Account Name	**Description**
Sonicwall	Firewall and Content Filtering of Websites - Security/Routing
Trend Micro	Antivirus and Spam Filter Servers and Workstations
HIS	*Guest /Event Wireless Internet* Maint. And Support
Nomadix	Guest Internet Gateway
AT&T Act#3103370702	Fire Alarm Numbers and 911 DID's
Verizon	Carlson Fractional T1 circuit
Generation Ix Technologies	Pop 3 Hosted Mailbox Users with Spam Virus Scan

Sales Contracts

Account Name	**Description**
Travel Click	E-Commerce Marketing Campaign
Smith Travel	Star Comp Set Report
Hospitality Information System, Inc.	Market View, Monthly and Quarterly LeadView Contact Research

Billing Term	Amount	Contract Term
Annual	$1,995.00	1 Year Renew Upon Payment
Annual	$1,944.00	1 Year Renew Upon Payment
Monthly	$1,295.00	1 Year Renew Upon Payment
Annual	$750.00	1 Year Renew Upon Payment
Monthly	$495.00	Month to Month
Monthly	$433.00	Month to Month
Monthly	$445.50	Month to Month

Billing Term	Amount	Contract Term
Monthly	Varies, upon Campain	Upon Payment
Monthly	$300.00	1 Year
Monthly	$360.00	Month to Month

Credit Card Agreements

Account Name	**Description**
Heartland Payment Systems	Credit Card Processor F&B Account # 650000003869347; Credit Card Processor Rooms Account #650000003869339 Processes Visa, Mastercard, Discover, Diners, JCB
American Express - Merchant Account	Credit Card Processor F&B Account # 1044389716 Credit Card Processor Rooms Account # 1043146166

Billing Term	Amount	Contract Term
Monthly	2.50%	Contract through Portfolio
Monthly	2.69%	Contract through Portfolio
Monthly	3.32%	1 Year Renew Upon Payment
Monthly	3.32%	1 Year Renew Upon Payment

Schedule 2.1(l) - Licenses and Permits

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Account Name	Issuing Agency	Permit/ Certificate Expiration/ Duration
Business Tax Permit Occupancy Tax Permit	City of Los Angeles Office of Finance	Permit-ACTIVE (Active until Suspended or Cancelled)
Certificate of Occupancy	City of Los Angeles Dept. of Building and Safety	Permit- ACTIVE (Active until Revoked)
Elevator Permit to Operate	City of Los Angeles Dept. of Building and Safety	Permit- ACTIVE
Fire Protection Equipment Performance Certificate	Los Angeles City Fire Department	Certificate- ACTIVE Expires 2011
Health Permits	City of Los Angeles Public Health	Permit- ACTIVE (yearly Renewal invoice arrives Sept)
High Rise Building and Fire Permit	Los Angeles City Fire Department	Permit- ACTIVE Expires 12/31/2011

Account Name	Issuing Agency	Permit/ Certificate Expiration/ Duration
Industrial Waste Permit	City of Los Angeles Dept of Public Works	Permit- ACTIVE Renews Quartly when paid does not issue new certificate
Seller's Permit	California State Board of Equalization	Permit- ACTIVE (Active until Revoked or Cancelled)
Steam Boiler Pressure Vessel Permit	City of Los Angeles Dept. of Building and Safety	Permit- ACTIVE Expires 3/1/2011

Schedule 3.2 – Purchase Price Allocation

Schedule 4.1(c) – Due Diligence Deliveries

- Client Account Lists
- Contracts, Leases & Agreements listed in schedules 2.1(i), (j), and (k)
- Collective Bargaining Agreements
- Utility Bills (2008, 2009, 2010)
- Historical and Budgeted Wages
- Insurance Loss Runs
- Insurance Survey [Schedule 5.1(m)]
- Title Report/Commitment and Schedule B exception documents
- List of Mechanic's Liens
- Parking Easements
- Real Estate Tax Bills
- ALTA Survey
- 5-Year Capital Expenditure Plan
- Radisson PIP
- Bomel February 2010 Billing (Project Completion Status)
- Recent Entitlements Evaluation Report, Property Condition Assessment, and Phase I Environmental Site Assessment
- Pro-Forma projections
- Property Photos
- Existing Management Agreement
- Existing Franchise Agreement
- Smith Travel Research Reports (Sep. 2008, Dec. 2008, Sep. 2009, Nov. 2009, Dec. 2009, Mar. 2010, Apr. 2010)
- Property Financials (2002, 2003, 2004, 2005, 2006, 2007, Monthly financial statements for Jan 2008 to June 2010)
- 2010 Business Plan/Budget

Schedule 4.3 – Assumed Contracts and Leases

Schedule 5.1(c) – Consents and Approvals; No Conflicts

NONE

Schedule 5.1(d) – Title to Personal Property

NONE

Schedule 5.1(f) – Litigation

Case Name	Case Number	Date Filed

[INFORMATION TO COME TOMORROW]

Schedule 5.1(g) – Collective Bargaining Agreements, Employment Agreements, Employment Claims; Seller Employee Plans

(i) Collective Bargaining Agreements and Employment Agreements

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Agreement Type	Union/Party	Employer	Effective Date	Expiration
Collective Bargaining Agreement	Local No. 501	Radisson Los Angeles Airport Hotel dba Portfolio LAX, LLC	October 27, 2009	July 31, 2013
Collective Bargaining Agreement	UNITED HERE Local 11	Portfolio Rosemont, LLC as Operator for the Radisson Los Angeles Airport Hotel	May 1, 2009	August 31, 2012
Concessions Letter	UNITED HERE Local 11	Radisson LAX Hotel & Portfolio Hotels & Resorts, LLC	None (Submitted on January 20, 2010, and currently operating under conditions	N/A

Agreement Type	Union/Party	Employer	Effective Date	Expiration
Side Letter & Participation Guidelines for HTP & ETP Training	UNITE HERE Local 11	Portfolio Hotels & Resorts, LLC	None (Submitted on February 1, 2010, and currently operating under conditions)	N/A

(ii) Employment Claims

1. By Alicia Colmenero, Room Attendant - voluntarily withdrawn by Union during negotiations in 2009.

2. By Eric Wilson and 2 other terminated Engineers, also named IUOE in ULP - - dismissed by NLRB after investigation, no cause found in 2009.

3. By UNITE HERE Local 11 for refusing to bargain in good faith by failing to furnish information requested for bargaining, and implementing changes to employees' health care benefits without bargaining. Withdrawn by NLRB in April 2009.

There is one personal injury lawsuit filed Joseph Connolly v. Radisson LAX that is currently stayed because of the bankruptcy, and as of yesterday plaintiff has not attempted to get relief from the stay. He was not a guest. He hit a tree limb when bicycling on the sidewalk outside the front of the hotel. CNA claim filed; then lawsuit came this year.

Schedule 5.1(g) – Collective Bargaining Agreements, Employment Agreements, Employment Claims; Seller Employee Plans (cont.)

(iii) Seller Employee Plans

1. Medical Plan – Option 1 – Salud Y Mas
2. Medical Plan – Option 2 – EOA
3. Non-medical Benefits offered to team members
4. 401k Snapshot
5. 401k Plan Highlights

Schedule 5.1(h) – Environmental Reports

#	Name	Date	Issuer
1	Phase 1 Environmental Site Assessment	April 28, 2010	Jones, Hill McFarland & Ellis

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Schedule 5.1(k) - Material Contracts

Radlax Gateway Hotel, LLC

Operating Contracts

Account Name	Address, City, State Zip		
On Command/ Lodgenet	7900 East Union Ave. Tower III	Denver	CO
Destination Shuttle	8939 Sepulveda Blvd Ste 110-1031	Los Angeles	CA
Radiant	651 W. Knox Street	Gardena	CA
Go Concierges	11828 La Grange Ave	Los Angeles	CA
Psav Presentation Service	23918 Network Place	Chicago	IL
Los Angeles World Airport	251 World Way	Los Angeles	CA
Muzak	115 Pine Ave. Suite 450	Long Beach	CA
Quality Security	16101 Ventura Blvd. Suite 315	Encino	CA
SoCal Uniform Rental	419 McGroarty, San Gabriel	San Gabriel	CA

	Contract Type	Material Contract
80237	Guest Room Movies/Satallite TV Contract	Not Term w/I 30
90045	Guest Transportation Contract	Not Term w/I 30
90248	Guest/Banquet/Room Linen outsource Contract	Not Term w/I 30
90025	Guest/Maint. Tracking Contract	Not Term w/I 30
60673-1239	On site AV provider Contract	In Excess of $10,000/year
90045	Parking Structure Use Permit Contract	In Excess of $10,000/year
90802	Public Area TV and Music Contract	Not Term w/I 30
91436	Security Services Contract	Not Term w/I 30
91776	Uniform Rental Contract	Not Term w/I 30

Quality Parking	16101 Ventura Blvd. Suite 315	Encino	CA

Management & Franchise Agreements

Account Name	**Address, City, State Zip**		
Creative Hospitality Investment Consulting	676 North Michigan Ave.	Chicago	IL
Portfolio LAX, LLC	9501 Technology Blvd. Suite 401	Rosemont	IL
Radisson World Wide	NW 7060 PO BOX 1450	Minneapolis	MN

Union Contracts

Account Name	**Address, City, State Zip**		
Internatinal Union of Operating Engineers Local 501, AFL - CIO	2405 West Third Street	Los Angeles	CA
Unite Here Local Union 11	464 S. Lucas Suite 210	Los Angeles	CA

91436	Valet Management Contract	Not Term w/I 30

	Contract Type	Material Contract
60611	Asset Management Company	In Excess of $10,000/year
90018	Management Company	In Excess of $10,000/year
55485-7060	Franchise Agreement Contract	In Excess of $10,000/year

	Contract Type	Material Contract
90057	Collective Barganing Agreement	Not Term w/I 30
90017	Collective Barganing Agreement	Not Term w/I 30

Maintenance Contracts

Account Name	Address, City, State Zip		
Browns Green Thumb	P.O. Box 837	Manhattan Beach	CA
Cal Air	12393 E. Slauson Ave.	Wittier	CA
Excel Elevator	4444 Union Pacific Ave.	City of Commerce	CA
Generation IX Technologies, Inc.	1607 Pontius Ave.	Los Angeles	CA
Kone	P.O. Box 1450	Moline	IL
Micros	7031 Columbia Gateway Drive	Columbia	MD
Pro Star Mechanical Services, Inc.	2031 E. Cerritos Ave. 7A	Anaheim	CA
Tri-Chem Technology, Corp.	1875 W. Commonwealth Ave. Unit F	Fullerton	CA
Waste Management	407 E. El Segundo Blvd.	Compton	CA

	Contract Type	Material Contract
90266	Landscaping Contract	Not Term w/I 30
90806	Environmental Testing Contract	Not Term w/I 30
90023	Elevator Maintenance	Purchsed by Kone
90025	Computer Maintenance Contract	Not Term w/I 30
61266-0429	Elevator Maintenance	Not Term w/I 30
21046	Computer Maintenance Contract	$10,000/year
92806	Boiler Service Contract	Not Term w/I 30
92833	Hotel Water Treatment Contract	Not Term w/I 30
90222	Waste Services Contract	Not Term w/I 30

Equipment Leases

Account Name	Address, City, State Zip		
Union Bank Leasing, Inc.	921 Walnut Street Suite 220	Boulder	CO
Pro Data	2152 Michelsone Ave	Irvine	CA

	Contract Type	Material Contract
80302	Equipment Lease - (Wireless Internet)	$10,000/year
	Equipment Lease - (Two copiers)	$10,000/year

Schedule 5.1(m) – Insurance

JMB INSURANCE
900 N. MICHIGAN AVENUE,
CHICAGO, IL 60611
PHONE 312.915.2200
FAX 312.915.2245

NAMED INSURED:
Radisson LAX
c/o Portfolio Hotels & Resorts, LLC
9501 Technology Boulevard, Suite 401
Rosemont, IL 60018

[Pages 1-8]

INSURANCE COMPANY	POLICY NUMBER	COVERAGE
		***Insureds Continued:** *RadLAX Gateway Hotel, LLC* RadLAX Gateway Deck, LLC RadLAX Gateway Project Management, LLC Mid America Development Services, LLC Mid America Services Group, LLC LAX Hospitality, LP Portfolio LAX, LLC
Affiliated FM	EJ200	**COMMERCIAL PROPERTY/BOILER POLICY** Blanket Building/Business Income/Rental Value *Per Occurrence* Special Form/Replacement Cost/Agreed Amount

SURVEY OF INSURANCE

DATE OF SURVEY: May 18, 2010

Locations: 6225 W. Century Blvd.
Los Angeles, CA 90045

LIMITS	PREMIUM	TERM	POLICY INCEPTION AND POLICY EXPIRATION
$400,000,000	$32,073	ST	12/1/09-10/1/10

INSURANCE COMPANY	POLICY NUMBER	COVERAGE
		Deductibles **All Other Perils (AOP)** **Flood** **Insured Values Used:** **Building** **$64,998,000** **Business Personal Property (BPP)** **$8,700,000** **Business Income** **$9,945,000** **Earth Movement (Annual Aggregate, for all coverages provided)** **Flood (Annual Aggregate, for all coverages provided)** **Extra Expense – The Company will pay the greater of the sub-limit or 15% of the reported annual Business Interruption values** **Green Endorsement Coverage – This Company will pay the lesser of the sub-limit or 25% of the physical damage for covered property**

LIMITS	PREMIUM	TERM	POLICY INCEPTION AND POLICY EXPIRATION
$ 10,000			
$ 100,000			
Not Covered			
$ 25,000,000			
$ 1,000,000			
$ 100,000			

INSURANCE COMPANY	POLICY NUMBER	COVERAGE
		Fire Fighting Materials and Expenses Professional Fees Expediting Expenses Trees, Shrubs, Plants and Lawns not to exceed a limit of $1,000 per item Pavements and Roadways Land and Water Clean Up Expense (Annual Aggregate, for all coverages provided) Installation Floater Newly Acquired Property Unnamed Locations Coverage Fine Arts Accounts Receivable Valuable Papers and Records Electronic Data Processing, Data and Media Demolition and Increased Cost of Construction Policy Limit Item A: Undamaged Portion Item B: Demolition Item C: Compliance with the Law Item D: Business Interruption Errors and Omissions Transit

LIMITS	PREMIUM	TERM	POLICY INCEPTION AND POLICY EXPIRATION
$ 100,000			
$ 100,000			
$ 250,000			
$ 100,000			
$ 250,000			
$ 50,000			
$ 250,000			
$ 2,500,000			
$ 1,000,000			
$ 250,000			
$ 500,000			
$ 500,000			
$ 500,000			
Policy Limit			
$ 10,000,000			
$ 10,000,000			
$ 1,000,000			
$ 1,000,000			
$ 250,000			

INSURANCE COMPANY	POLICY NUMBER	COVERAGE
		Terrorism Coverage and the Supplemental United States Certified Act of Terrorism Endorsement **A. United States Certified Act of Terrorism coverage** **B. Terrorism Coverage for Locations Outside of the United States (Annual Aggregate, for all coverages provided)** **Fungus, Mold or Mildew** **Emergency Vacating Expense** **Off-Premises Service Interruption - Property Damage** **Arson or Theft Reward** **Money and Securities** **Locks and Keys** **Tenants Relocation Expense** **Soft Costs**

LIMITS	PREMIUM	TERM	POLICY INCEPTION AND POLICY EXPIRATION
$400,000,000			
Not Covered			
$ 1,000,000			
$ 100,000			
$ 1,000,000			
$ 100,000			
$ 100,000			
$ 100,000			
$ 100,000			
$ 500,000			

INSURANCE COMPANY	POLICY NUMBER	COVERAGE
		Business Interruption - Extensions of Coverage Sub-Limits: Days of Ordinary Payroll Days of Civil Authority Off-Premises Service Interruption Contingent Business Interruption Lost Lease Ingress/Egress Tax Treatment Days of Extended Period of Indemnity
National Fire Ins. of Hartford (CNA) Continental Ins. Co. (CNA)	2094031115 (GL) 2099478391 (Liquor)	**COMMERCIAL GENERAL LIABILITY** General Aggregate / Per Location Products Aggregate Personal and Advertising Injury Each Occurrence – Bodily Injury & Property Damage Combined Single Limit Medical Expense Commercial Liquor Liability Each Common Cause Limit Aggregate Limit

LIMITS	PREMIUM	TERM	POLICY INCEPTION AND POLICY EXPIRATION
90			
30			
$ 1,000,000			
$ 250,000			
$ 500,000			
$ 250,000			
$ 100,000			
365			
	$24,510	ST	12/1/09 - 10/1/10
$ 2,000,000			
$ 2,000,000			
$ 1,000,000			
$ 1,000,000			
$ 15,000			
$ 1,000,000			
$ 1,000,000			

INSURANCE COMPANY	POLICY NUMBER	COVERAGE
		Rating Basis – Estimated Receipts Hotel $17,000,000 Restaurant $ 5,000,000 Liquor Receipts $ 800,000 Audit Period – Annual Coverage Extensions: **Additional Insureds** where required by written contract or agreement such as Permits, Mortgagees, Financial Control, or Leases for Real Property, Equipment or Land **Additional Insured Vendors** **Broad Notice of Occurrence** extends the requirement to notify us of an occurrence that might result in a claim, until someone of authority becomes aware of it **Employees as Insureds-Health Care Services** extends incidental malpractice coverage for employees or volunteer workers who provide a health care service. This exception does not apply to physicians

LIMITS	PREMIUM	TERM	POLICY INCEPTION AND POLICY EXPIRATION

INSURANCE COMPANY	POLICY NUMBER	COVERAGE
		Elevator property damage to property covered **Expanded Bodily Injury** expanded to include mental injury or mental anguish resulting from bodily injury, sickness or disease **Expanded Personal Injury** expanded to include discrimination or humiliation not employment of housing related **Expected Injury arising from the use of reasonable force to protect persons or property** is covered for bodily injury and property damage **Legal Liability** is increased to $200,000 on an 'all risk' basis on the Contractors, Manufacturers, and Basic GLEE if the insured is legally liable for damage **Liberalization Clause** coverage improvements extended for no additional premium will automatically apply to this policy

LIMITS	PREMIUM	TERM	POLICY INCEPTION AND POLICY EXPIRATION

INSURANCE COMPANY	POLICY NUMBER	COVERAGE
		Elevator property damage to property covered **Expanded Bodily Injury** expanded to include mental injury or mental anguish resulting from bodily injury, sickness or disease **Expanded Personal Injury** expanded to include discrimination or humiliation not employment of housing related **Expected Injury arising from the use of reasonable force to protect persons or property** is covered for bodily injury and property damage **Legal Liability** is increased to $200,000 on an 'all risk' basis on the Contractors, Manufacturers, and Basic GLEE if the insured is legally liable for damage **Liberalization Clause** coverage improvements extended for no additional premium will automatically apply to this policy

LIMITS	PREMIUM	TERM	POLICY INCEPTION AND POLICY EXPIRATION

INSURANCE COMPANY	POLICY NUMBER	COVERAGE
		Medical Payments are increased to $15,000 with a reporting period up to three years from the date of accident **Non-owned Aircraft** is covered if chartered with a flight crew **Non-owned Watercraft** is expanded to include boats up to 55 feet **Newly Formed or Acquired Organizations** notification time expanded to the end of the policy period or next anniversary of its inception date, whichever is earliest **Notice of Occurrence** will not penalize the policyholder for a notice of claim/occurrence that is inadvertently reported as a workers compensation claim but develops into a liability claim **Past Joint Venture/Partnership Coverage** provides contingent coverage for the policyholder's interest in past joint ventures, partnerships or limited liability companies

LIMITS	PREMIUM	TERM	POLICY INCEPTION AND POLICY EXPIRATION

INSURANCE COMPANY	POLICY NUMBER	COVERAGE
		Supplementary Payments increased to $1,000 per day for loss of earnings and $2,500 for bail bonds **Unintentional Failure to Disclose Hazards** will not penalize policyholder for inaccurate information provided to us unintentionally
Continental Insurance Co. (CNA)	2094031129	**COMMERCIAL AUTO POLICY** Liability Coverage - Bodily Injury-Property Damage-CSL Per Accident – Any Auto Auto Medical Payment Per Accident – Specified Autos Uninsured Motorists/ Underinsured Motorists Owned Autos Auto Physical Damage – Described & Hired Autos Subject to Comprehensive & Collision Deductibles of $1,000

LIMITS	PREMIUM	TERM	POLICY INCEPTION AND POLICY EXPIRATION
	$90.07	ST	12/1/09 - 10/1/10
$ 1,000,000			
$ 5,000			
$ 1,000,000			
Actual Cash Value			

INSURANCE COMPANY	POLICY NUMBER	COVERAGE
		Garagekeepers Coverage **Primary for Physical Damage to Guest Auto While In Custody of Insured** **Comprehensive – Subject to $500 Deductible** **Collision – Subject to $500 Deductible**
National Fire Ins. of Hartford (CNA)	2094031115	**COMMERCIAL CRIME** **Coverage A – Employee Theft** **Coverage B – Forgery or Alteration** **Coverage C – Theft of Money – Inside Premises** **Coverage D – Theft of Money – Outside Premises** **Coverage F – Computer Fraud** **Guest Property – Inside Premises (Subject to $10,000 Limit Per Guest)** **Guest Property – Inside Safe Deposit** **Deductibles Per Occurrence:** **Coverages A, B, F: $5,000** **Coverages C, D: $1,000** **Guest Property/Safe Deposit: No Deductible**

LIMITS	PREMIUM	TERM	POLICY INCEPTION AND POLICY EXPIRATION
	$ 7,860	ST	12/1/09 - 10/1/10
$ 25,000,000			
$ 25,000,000			
	$ 2,317	ST	12/1/09 - 10/1/10
$ 25,000,000			
$ 25,000,000	Service Fee: $1,222		
	$149,771	AN	10/1/09-10
Statutory Per State Law			
	Includes:		
$ 1,000,000	$2,109 RM Fee		
$ 1,000,000	$1,716 Srvc Fee		
$ 1,000,000			

INSURANCE COMPANY	POLICY NUMBER	COVERAGE
Fireman's Fund Insurance Company	CPD-000-7204-2351	**EMPLOYMENT PRACTICES LIABILITY INSURANCE** **Employment Practices – Each Claim & Aggregate Subject to Retained Amount $25,000 Each Loss**

THIS SURVEY IS ISSUED AS A MATTER OF INFORMATION ONLY AND DOES NOT ADD, AMEND, OR EXTEND COVERAGE OFFERED BY THE POLICIES THEMSELVES. FOR EXACT INFORMATION, PLEASE CONSULT THE POLICY.

LIMITS	PREMIUM	TERM	POLICY INCEPTION AND POLICY EXPIRATION
$ 1,000,000	$ 3,718	ST	10/28/09 - 10/1/10

Schedule 5.1(s) - Accounts Receivable

[logo] *Radisson Hotel At Los Angeles Airport*

NA Aging Summary of Accounts

Age Credits : **N**

Account Name	Account No.	Credit Limit/ LOC	Up to 30
A/R Ledger			
ABC, Inc.	ABCINC		0.00
Aeroflot Russian Airlines	AEROFLOT		0.00
AeroMexico Airlines LAX	AEROMEX		0.00
Air Canada LAX	AIRCANADA		1,672.16
Air New Zealand LAX	AIRNEWZE		0.00
Air Pacific Airlines	AIRPAC		708.91
Air Tahiti Nui	AIRTAHITI		78.69
Airtran August	AUGTRAN		0.00
AirTran December	DECTRAN		2,223.90
AirTran January	JANUTRAN		44,848.65
Airtran July	JULYTRAN		0.00

02-01-11

03:20

31- 60	61- 90	91 - 120	121 and over	Total
0.00	62.72	125.44	501.76	689.92
0.00	1,284.38	2,423.40	0.00	3,707.78
237.76	0.00	0.00	403.74	641.50
508.65	104.25	108.33	0.00	2,393.39
80.00	174.57	0.00	0.00	254.57
0.00	0.00	0.00	0.00	708.91
0.00	0.00	0.00	0.00	78.69
0.00	0.00	0.00	1,941.38	1,941.38
43,956.25	0.00	0.00	0.00	46,180.15
0.00	0.00	0.00	0.00	44,848.65
0.00	0.00	0.00	33,077.49	33,077.49

Account Name	Account No.	Credit Limit/ LOC	Up to 30
Airtran October	OCTTRAN		0.00
Alaska Airlines LAX	ALASKA		1,042.77
Allied T Pro	ALLIEDTP		1,440.29
America Asia Travel Center	AMATC		855.30
American Airlines LAX	AMEAIR		927.23
American Eagle CREW	AMEACREW		135.71
American Eagle LAX	AMEALAX		0.00
American Ring Travel	AMERTRA		74.13
American Tours International	ATI		786.90
Asiana Airlines	ASIANA		3,461.23
British Airways	BRIAIR		3,724.64
California Judges Association	CALJUD		112.90
California Star Ball	CASTBA		0.00
Celebration of Life	B1103		6,584.43

31- 60	61- 90	91 - 120	121 and over	Total
0.00	1,853.25	694.54	0.00	2,547.79
725.10	134.58	0.00	0.00	1,902.45
817.73	0.00	68.43	0.00	2,326.45
0.00	0.00	171.06	0.00	1,026.36
2,227.67	1,601.16	149.58	0.00	4,905.64
1,888.96	0.00	0.00	2,979.65	5,004.32
0.00	403.74	0.00	0.00	403.74
0.00	0.00	74.13	898.82	1,047.08
1,045.78	157.38	1,414.45	74.13	3,478.64
170.11	0.00	0.00	0.00	3,631.34
33,446.77	1,143.05	0.00	0.00	38,314.46
0.00	0.00	0.00	0.00	112.90
16,734.78	10,842.05	0.00	0.00	27,576.83
0.00	0.00	0.00	0.00	6,584.43

Account Name	Account No.	Credit Limit/ LOC	Up to 30
China Airlines	CHIAIR		352.26
China Eastern Airlines	CHIEAS		6,091.10
City Tours USA	CITYTOURS		319.32
Consulate of St. Vincent & the Grenadine,	B1112		0.00
Continental Airlines	CONTINENTAL		469.42
Delta Airlines LAX	DELTAAIR		1,772.39
Delta Tour & Travel Services	DELTATOUR		136.86
Down Under Answers	DOWNUND		78.69
Eva Airways	EVAAIR		370.65
Expedia Inc	EXPEDIA		579.10
Frontier Airlines	FRONTIER		534.65
FTI North America, Inc.	FTI		1,275.07
GOWAY Travel	GOWAYTR		236.07
Great Lakes Airlines	GREATLAKES		0.00

31- 60	61- 90	91 - 120	121 and over	Total
0.00	0.00	0.00	0.00	352.26
2,852.77	2,880.07	0.00	0.00	11,823.94
0.00	0.00	0.00	0.00	319.32
151.46	0.00	0.00	0.00	151.46
461.75	0.00	0.00	0.00	931.17
74.13	2,146.88	3,541.18	0.00	7,534.58
0.00	0.00	0.00	0.00	136.86
0.00	0.00	0.00	0.00	78.69
0.00	0.00	0.00	0.00	370.65
493.63	145.96	0.00	0.00	1,218.69
1,357.34	0.00	0.00	0.00	1,891.99
68.43	0.00	136.86	136.86	1,617.22
236.07	393.45	314.76	0.00	1,180.35
74.13	0.00	0,00	0.00	74.13

Account Name	Account No.	Credit Limit/ LOC	Up to 30
Gullivers Travels	GULLTRA		2,591.78
Holiday House	HOLIDAYHOUS		157.38
HOTELBEDS	HOTELBED		34,272.74
Jet Blue Airlines	JETBLUE		0.00
JHC CO., LTD.	JHCCO		314.766
Korean Air	KORAIR		4,301.95
LAN Airlines	LANAIRLINES		40,528.44
LAND MARK EDUCATION	LANDMARKEDU		10,460.95
LAUSD	334		0.00
Loyola Marymount University	LMULA		101.50
Lufthansa Airlines	LUFTHA		3,423.70
MLT Vacations	MLTVAC		2,908.33
New World Travel	NEWTRVL		68.43
Orbitz	OB0508		0.00
PCC USA Vacation, Inc.	PCCVA		78.69
Philippine Airlines	PHILAIR		11,905.31

31- 60	61- 90	91 - 120	121 and over	Total
1,117.62	79.83	0.00	0.00	3,789.23
0.00	0.00	0.00	0.00	157.38
10,468.93	2,010.95	4,611.74	406.13	51,770.49
74.13	0.00	0.00	0.00	74.13
0.00	0.00	0.00	0.00	314.76
0.00	0.00	0.00	0.00	4,301.95
148.26	0.00	0.00	0.00	40,676.70
641.38	0.00	0.00	0.00	11,102.33
0.00	0.00	0.00	5,305.88	5,305.88
1,573.54	0.00	0.00	0.00	1,675.04
4,702.18	132.82	781.95	0.00	9,040.65
78.69	0.00	79.83	382.04	3,448.89
0.00	0.00	0.00	0.00	68.43
82.21	0.00	0.00	0.00	82.21
0.00	0.00	0.00	0.00	78.69
140.83	0.00	0.00	0.00	12,046.14

Account Name	Account No.	Credit Limit/ LOC	Up to 30
Pleasant Island Holidays	PLEASANT		0.00
Qantas Airways	QANTAS		74.13
Quick Book Inc	QUICKB		- 157.04
Sheraton Gateway	SHERAGA		0.00
Shuttle America Airlines	SHUTTLE		0.00
Singapore Airlines	SINGAIR		593.04
SkyWest Airlines LAX	SKYWEST		1,119.04
Southwest Airlines	SOUTHW		236.07
SVG Outreach Organization	SVG1		0.00
Sysco food Services	SYSCO		0.00
TACA Airlines	TACAAIR		0.00
Tedjo Express Tours	TEDJOEXTOU		157.38
Temp America Asia Travel Center	AMEASI		114.04
Temp Bravo Travel	BRATRA		273.72
TEMP California Faculty Association	CALIFACANA		1,421.00

31- 60	61- 90	91 - 120	121 and over	Total
78.69	0.00	0.00	0.00	78.69
689.75	266.06	0.00	0.00	1,029.94
0.00	203.00	0.00	0.00	45.96
0.00	0.00	11,039.66	0.00	11,039.66
74.13	0.00	0.00	0.00	74.13
0.00	111.90	0.00	0,00	704.94
415.65	0.00	0.00	0.00	1,534.69
148.26	0.00	0.00	0.00	384.33
2,238.90	0.00	0.00	0.00	2,238.90
0.00	5,453.96	0.00	0.00	5,453.96
741.04	2,026.80	222.39	296.52	3,286.75
0.00	0.00	0.00	0.00	157.38
0.00	0.00	0.00	0.00	114.04
410.58	0.00	0.00	0.00	684.30
0.00	0.00	0.00	0.00	1,421.00

Account Name	Account No.	Credit Limit/ LOC	Up to 30
Temp Capital Gain Publishing	CAPGAIN		0.00
Temp Commercial Training Institute	COMTRA		0.00
TEMP Fresh Entertainment Group	FRESENTGRP		0.00
Temp Golden Star Tour	GLDSTA		500.00
Temp Hoop Life Academy	EATBAS		0.00
TEMP IBIS World Investors Resource Cente	IBISWORLD		0.00
Temp JTB	JTBINT		0.00
Temp LA SRCC Church	LASRC		0.00
Temp Lassen Tours	LASTOU		68.43
Temp Matt Miley Group	MATMIL		0.00
Temp National Career Fairs	NATIONALCAREER	3,000.00	0.00
Temp Preferred Travel	PRETRA		0.00

31- 60	61- 90	91 - 120	121 and over	Total
0.00	2,277.12	0.00	0.00	2,277.12
0.00	0.00	0.00	8,051.55	8,051.55
427.65	0.00	0.00	0.00	427.65
0.00	- 2,450.00	3,681.42	0.00	1,731.42
0.00	- 4,522.68	5,224.13	0.00	701.45
0.00	0.00	0.00	1,158.94	1,158.94
0.00	. 0.00	0.00	29,371.57	29,371.57
0.00	0.00	0.00	2,235.18	2,235.18
0.00	0.00	0.00	0.00	68.43
0.00	0.00	0.00	338.70	338.70
0.00	2,622.36	0.00	0.00	2,622.36
- 4,848.09	3,656.80	0.00	0.00	- 1,191.29

Account Name	Account No.	Credit Limit/ LOC	Up to 30
Temp Super Entertainment	SUPENT		1,508.87
The Westin Los Angeles Airport Hotel	WESTINHOTEL		0.00
Thomas Cook Canada, Inc.	THOMCOOK		1,416.42
Tour America, Inc.	TOURAMER		2,580.63
Tourico Holiday Flights	TOURICO		- 3,691.62
Transhotel USA Inc	TRANSHOTEL		1,078.00
Triune Travel, LLC	TRIUNETRVL		718.48
UCLA Center for Prehospital Care,	UCLA1		0.00
United Airlines LAX	UNITLAX		0.00
United Tours of America	UNITEDTOUR		0.00
US Airways	USAIR		59.50
USMEPS	MEPS		69,071.30
USMEPS-NOVEMBER	USMEPSN		2,352.00

31- 60	61- 90	91 - 120	121 and over	Total
0.00	0.00	0.00	0.00	1,508.87
0.00	0.00	0.00	294.22	294.22
1,124.46	865.59	550.83	0.00	3,957.30
2,629.65	148.26	370.64	0.00	5,729.18
24,005.55	26,605.49	0.00	0.00	46,919.42
1,863.64	798.30	0.00	0.00	3,739.94
102.64	0.00	0.00	0.00	821.12
-1,015.44	0.00	0.00	0.00	- 1,015.44
1,378.56	148.26	1,046.18	0.00	2,573.00
0.00	0.00	0.00	1,596.60	1,596.60
202.01	0.00	0.00	0.00	261.51
36,282.72	0.00	174.00	70,217.90	175,745.92
48,441.50	99,148.50	0.00	0.00	149,942.00

Account Name	Account No.	Credit Limit/ LOC	Up to 30
USMEPS-DECEMBER	USMEPSDEC		- 48,776.74
VAustralia Airlines	VAUSTRALIA		0.00
Virgin America Airlines	VIRAME		0.00
Virgin Atlantic Airlines	VIRATLC		- 261.74
West Jet Airlines LAX	WESTJ		0.00
Wotif	WOTIF		2,641.79
Total A/R Ledger		101.00	225,104.08
			24.71%
Accruals			
Total Accruals		0.00	0.00
			0.00%
	Grand Total	101.00	225,104.08
			24.71%

31- 60	61- 90	91 - 120	121 and over	Total
61,458.60	0.00	0.00	0.00	12,681.86
0.00	155.21	0.00	2,889.26	3,044.47
1,526.50	0.00	0.00	0.00	1,526.50
17,566.54	0.00	0.00	0.00	17,304.80
0.00	0.00	593.04	0.00	593.04
0.00	0.00	0.00	0.00	2,641.79
322,580.53	163,066.02	37,597.97	162,558.32	910,906.92
35.41%	17.90%	4.13%	17.85%	100.00%
0.00	0.00	0.00	0.00	0.00
0.00%	0.00%	0.00%	0.00%	0.00%
322,580.53	163,066.02	37,597.97	162,558.32	910,906.92
35.41%	17.90%	4.13%	17.85%	100.00%

Filter *Account Type All*
Sort Order Account Name
For Date 01-31-11

[Pages 1 to 5 of 5]

agingsum

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

No. 11-166

In the Supreme Court of the United States

RADLAX GATEWAY HOTEL, LLC
and RADLAX GATEWAY DECK, LLC,
Petitioners,

v.

AMALGAMATED BANK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONERS

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January 26, 2012

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QUESTION PRESENTED

Section 1129(b)(2)(A) of the Bankruptcy Code sets forth three alternative standards for determining whether a chapter 11 plan is "fair and equitable" to an objecting class of secured creditors. In this case, Petitioners (the Debtors) proposed a chapter 11 plan involving a sale of assets free of liens that satisfies one of these standards by providing their secured lender with the "indubitable equivalent" of its claim pursuant to § 1129(b)(2)(A)(iii). The courts below, however, held that the Debtors must proceed under § 1129(b)(2)(A)(ii) and allow their secured lender to "credit bid" (bid its debt in lieu of cash) at the sale.

The question presented is:

> Whether a debtor may pursue a chapter 11 plan that proposes to sell assets free of liens without allowing the secured creditor to credit bid, but instead providing it with the indubitable equivalent of its claim under 11 U.S.C. § 1129(b)(2)(A)(iii).

PARTIES BELOW

In addition to the parties listed in the caption, River Road Hotel Partners, LLC, River Road Expansion Partners, LLC, River Road Restaurant Pads, LLC, River Road Hotel Mezz, LLC, River Road Expansion Mezz, LLC, and River Road Restaurant Mezz, LLC were parties to the consolidated appeal before the court of appeals.

The Rule 29.6 statement for Petitioners RadLAX Gateway Hotel, LLC and RadLAX Gateway Deck, LLC is set forth in the Petition for a Writ of Certiorari.

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The opinion of the United States Court of Appeals for the Seventh Circuit in *River Road Hotel Partners, LLC v. Amalgamated Bank (In re River Road Hotel Partners, LLC)*, Nos. 10-3597 & 10-3598, is reported at 651 F.3d 642 and is set forth in the Appendix to the Petition for a Writ of Certiorari ("Pet. App.") at 1a. The orders of the United States Bankruptcy Court for the Northern District of Illinois in *In re RadLAX Gateway Hotel, LLC*, No. 09–B–30047, and *In re River Road Hotel Partners, LLC*, No. 09–B–30029, are not reported and are set forth at Pet. App. 38a and 40a, respectively.

JURISDICTION

The United States Bankruptcy Court for the Northern District of Illinois had original jurisdiction over this case under 28 U.S.C. § 157. The bankruptcy court entered the order under review on October 5, 2010. The United States Court of Appeals for the Seventh Circuit had jurisdiction over Petitioners' appeal under 28 U.S.C. § 158. The court of appeals entered its judgment on June 28, 2011. Petitioners filed a timely Petition for a Writ of Certiorari on August 5, 2011, which the Court granted on December 12, 2011. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case turns primarily on the interpretation of 11 U.S.C. § 1129(b)(2)(A), which provides:

> (b)(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:
>
> (A) With respect to a class of secured claims, the plan provides—
>
> (i) (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and
>
> (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;
>
> (ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

This case also involves 11 U.S.C. §§ 102, 363(k), 1111(b), 1123(a)(5), and 1129(b)(1), which are set forth in full in the Appendix.

STATEMENT OF THE CASE

A. Overview

Although chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*, was traditionally used to reorganize an ongoing enterprise, it has been increasingly used to facilitate the sale of a debtor's assets and orderly distribution of the proceeds pursuant to the Code's priority scheme. *See, e.g.*, Douglas G. Baird & Robert K. Rasmussen, Reply, *Chapter 11 at Twilight*, 56 STAN. L. REV. 673, 675–76 (2003) (noting that over half of large corporate chapter 11 cases in 2002 involved asset sales). To that end, § 1123(a)(5)(D) of the Code authorizes a debtor to sell its assets as a way to implement a chapter 11 plan. *See* 11 U.S.C. § 1123(a)(5)(D) ("a plan shall * * * provide adequate means for the plan's implementation, such as * * * [the] sale of all or any part of the property of the estate, either subject to or free of any lien * * *.").

As a general rule, a chapter 11 plan must be accepted by all "impaired" classes of creditors (creditors that will receive less than the full amount of their claims) to be confirmed. *See* 11 U.S.C. §§ 1124, 1129(a)(8). Section 1129(b), however, permits confirmation of a plan despite the rejection by an impaired class of creditors—a "cramdown"—if certain conditions are satisfied. One of those conditions is that

the plan be "fair and equitable" to the dissenting class. Section 1129(b)(2)(A) specifies three alternative ways in which a chapter 11 plan can be "fair and equitable" to an objecting class of secured creditors: (i) if the secured creditor retains its lien and is paid deferred cash payments totaling at least the present value of its collateral; (ii) if the secured creditor is allowed to credit bid at the sale of its collateral free of its liens; or (iii) if the secured creditor will realize the "indubitable equivalent" of its secured claim. 11 U.S.C. § 1129(b)(2)(A).

In this case, the Debtors sought to sell substantially all their assets in bankruptcy through an open and advertised auction and to use the cash proceeds to fund a chapter 11 plan. In connection with the auction, the Debtors proposed bid procedures that, among other things, precluded their secured lender from credit bidding at the sale, but allowed the lender to bid cash like other bidders. If the lender objected to confirmation of the plan, the Debtors proposed to satisfy § 1129(b)(2)(A)(iii) by providing the lender with the indubitable equivalent of its claim, namely the cash proceeds from the sale net of certain liens and claims of higher priority.

The bankruptcy court and the Seventh Circuit denied the Debtors' request to conduct the auction without credit bidding, holding that any chapter 11 plan involving the sale of assets free of liens must occur under § 1129(b)(2)(A)(ii) of the Code, which requires a debtor to allow its secured creditor to credit bid at the sale of its collateral. This holding conflicts with *In re Philadelphia Newspapers, LLC*, 599 F.3d 298 (3d Cir. 2010), and *Scotia Pacific Co. v. Official Unsecured Creditors' Comm. (In re Pacific Lumber*

Co.), 584 F.3d 229 (5th Cir. 2009), which held that a debtor may sell assets free of liens in a chapter 11 plan without credit bidding by providing the secured creditor with the indubitable equivalent of its secured claim under § 1129(b)(2)(A)(iii). The Debtors submit that the Seventh Circuit incorrectly disregarded the plain language of § 1129(b)(2)(A), which permits confirmation of a chapter 11 plan as "fair and equitable" if any one of its three subparts is satisfied.

B. Factual Background

The Debtors own the Radisson Hotel at Los Angeles International Airport (LAX) and an adjacent, partially completed parking structure. J.A. 100–01. In November 2007, the Debtors obtained a $142 million construction loan from the Longview Ultra Construction Loan Investment Fund (the "Lender") to acquire the property, renovate the hotel, and build the new parking structure. J.A. 101 (Respondent Amalgamated Bank serves as trustee and administrative agent for the Lender). Due to the severe economic downturn beginning in 2008 and the Lender's refusal to advance funding to complete the parking structure, the Debtors filed voluntary petitions for chapter 11 relief in the United States Bankruptcy Court for the Northern District of Illinois in August 2009. J.A. 102–04. At the time of that filing, the Debtors owed the Lender over $120 million secured by a first priority lien on substantially all of the Debtors' assets. Pet. App. 5a.

The Debtors share common ownership with River Road Hotel Partners, LLC and certain other affiliated companies that owned the InterContinental Chicago O'Hare Hotel. The River Road entities also obtained a

loan from the Lender in 2007 and, due to the same economic pressures, filed for chapter 11 relief in the same court immediately before the Debtors' filing. Pet. App. 2a–3a. The two cases proceeded in parallel.

Early in the cases, the Debtors embarked on an extensive marketing campaign to solicit offers from outside investors to fund a plan of reorganization. J.A. 104–05. Due to the severe decline in property values and resulting disparity between the value of the Debtors' assets and the amount of secured debt, the Debtors were unable to attract equity investments or viable financing alternatives. The Debtors did, however, procure a buyer willing to acquire substantially all of the Debtors' assets for $47.5 million in cash. J.A. 106–07. In addition to the cash purchase price, the buyer agreed to fund distributions to unsecured creditors through a chapter 11 plan from *the future profits of the hotel.* J.A. 108. The buyer further agreed to subject its bid to higher and better offers at an open auction to be conducted after continued marketing efforts, but the buyer required the Lender to be prohibited from credit bidding at the sale. J.A. 108–09.

In June 2010, the Debtors filed a joint chapter 11 plan proposing the auction sale of substantially all their assets, with the proceeds to be used to fund a chapter 11 plan for the benefit of their creditors. J.A. 14. In support of their plan, the Debtors filed a motion asking the bankruptcy court to approve bid procedures specifying that the sale would be conducted pursuant to § 1123(a), § 1123(b), and § 1129(b)(2)(A)(iii) of the Code, and that no secured creditor would be permitted to credit bid at the sale. J.A. 118. The Lender objected that the plan could not be confirmed unless the Lender

was permitted to credit bid at the auction pursuant to § 1129(b)(2)(A)(ii). J.A. 2.

C. The Bankruptcy Court Opinion

In October 2010, the bankruptcy court denied the Debtors' bid procedures motion. Pet. App. 38a, 40a. The court acknowledged that the Third Circuit in *Philadelphia Newspapers* had approved nearly identical bid procedures and held that a chapter 11 plan involving an auction sale of assets free of liens without credit bidding could be confirmed by providing the secured creditor with the indubitable equivalent of its secured claim under § 1129(b)(2)(A)(iii). Pet. App. 42a. The bankruptcy court found the dissenting opinion in *Philadelphia Newspapers* more persuasive, however, and held that the Debtors could not proceed with the auction unless they allowed credit bidding and pursued confirmation pursuant to § 1129(b)(2)(A)(ii). *Id.* Recognizing the importance of the issue to a broad range of bankruptcy cases, the bankruptcy court certified an immediate appeal to the Seventh Circuit. Pet. App. 30a, 33a.

In the meantime, the bankruptcy cases continued and the Lender filed a motion for relief from the automatic stay pursuant to § 362(d)(1) and § 362(d)(2) of the Code to pursue its state law foreclosure rights against its collateral. The bankruptcy court denied that motion. For their part, the Debtors filed an amended chapter 11 plan and an amended asset purchase agreement in the bankruptcy court, both of which were virtually identical to their predecessors except that (1) the purchase price for the Debtors' assets rose to $55 million to account for the appreciation in value of the assets during the

bankruptcy cases, and (2) the deadlines for approval of the bid procedures motion and other events were extended. J.A. 174.

D. The Seventh Circuit Opinion

The Seventh Circuit accepted the Debtors' direct appeal and consolidated it with the related cases involving the River Road entities. J.A. 163–64. The court of appeals heard argument in April 2011 and issued an opinion affirming the bankruptcy court's decision in June 2011. Pet. App. 1a.

As an initial matter, the Seventh Circuit rejected the Lender's argument that the appeal was moot, finding that the Debtors had not abandoned their proposed auction or chapter 11 plan. Pet. App. 8a (citing the Debtors' amended asset purchase agreement and their pursuit of the appeal). The court further reasoned that in any event, the case fit squarely within the well-established exception to mootness for cases that are capable of repetition, yet evade review due to timing issues. Pet. App. 8a–9a.

On the merits, the Seventh Circuit concluded that § 1129(b)(2)(A) did not have a plain meaning because subsection (iii) does not specify whether it applies to any type of chapter 11 plan or, instead, only to plans not covered by subsections (i) and (ii). Pet. App. 17a. Having established an ambiguity, the court looked beyond the plain text to canons of statutory interpretation, legislative history, and secured creditor protections found in other parts of the Code to conclude that any plan involving the sale of assets free of liens could not be confirmed under subsection (iii), but only under subsection (ii).

E. Subsequent Events, Including the Court's Grant of Certiorari

Shortly after the Seventh Circuit's decision, in July 2011, the bankruptcy court confirmed the Lender's chapter 11 plan in the related River Road cases. The River Road entities therefore did not seek review of the Seventh Circuit's ruling.

The RadLAX bankruptcy cases have not concluded, however, and the Debtors petitioned for a writ of certiorari. The Court granted the petition on December 12, 2011. Noting that the Court had granted certiorari, the bankruptcy court denied the Lender's renewed motion for relief from the automatic stay. J.A. 8.

SUMMARY OF THE ARGUMENT

Section 1129(b)(2)(A) of the Bankruptcy Code unambiguously provides three alternative ways to provide "fair and equitable" treatment to a secured creditor, as required to confirm a chapter 11 plan over its objection: (i) the secured creditor retains its lien on the collateral and receives deferred cash payments equal to the present value of the collateral; (ii) the secured creditor is allowed to credit bid at the sale of its collateral free of its lien; or (iii) the secured creditor realizes the "indubitable equivalent" of its secured claim.

In this case, the Debtors propose selling substantially all of their assets free of liens at an open and advertised auction pursuant to bid procedures that prohibit any secured creditor from credit bidding (but permit cash bidding). To confirm the plan over the Lender's objection, the Debtors intend to provide the

Lender with the indubitable equivalent of its claim under § 1129(b)(2)(A)(iii). Nothing in the plain language of the statute prohibits the Debtors from conducting the auction and pursuing confirmation under subsection (iii).

Numerous features in the statutory text support this conclusion. First, the three alternatives are connected by the disjunctive "or," indicating that any one of the three standards, alone, satisfies the "fair and equitable" requirement. Second, the introductory phrase "the plan provides" in § 1129(b)(2)(A) indicates that it is the plan proponent (here the Debtors) that decides which of the three alternatives to pursue. Third, the word "includes" in § 1129(b)(2) makes clear that the plan proponent is not limited in its choice among the three alternatives.

Congress knew how to limit the use of the "indubitable equivalent" standard. In § 361(3)—the only other section of the Code to use the phrase—Congress limited the scope of the "indubitable equivalent" standard by specifying what it does not include. 11 U.S.C. § 361(3). Similarly, Congress could have added the phrase "except as provided in subsections (i) and (ii) of this section" to the beginning of § 1129(b)(2)(A)(iii) as it did when limiting the application of numerous other sections in the Code. Section 1129(b)(2)(A)(iii) contains no such limitation, convincing evidence that Congress intended to give debtors flexibility to confirm any type of chapter 11 plan—even one involving the sale of collateral free of liens—over the dissent of their secured creditor so long as the plan provides the indubitable equivalent of the creditor's secured claim.

Had Congress truly intended to provide an absolute right to credit bid in all sales under chapter 11, it would have imposed such a requirement in § 1123(a)(5)(D), which governs the sale of collateral under a chapter 11 plan. That statute expressly permits the sale of property "either subject to or free of any lien" as a way to implement a chapter 11 plan, but it does *not* include any right to credit bid at such a sale. 11 U.S.C. § 1123(a)(5)(D).

This omission is in stark contrast to § 363(k), which governs the sale of collateral outside a chapter 11 plan. Section 363(k) permits the sale of encumbered property and, unlike § 1123(a)(5)(D), expressly requires that secured creditors have the presumptive right to credit bid. Congress declined to extend the application of § 363(k) to all sales in a chapter 11 plan. The Court has long recognized that when Congress includes a specific provision in one part of a statute, but excludes it in another part of the same statute, the disparate treatment is purposeful and should be respected.

The text of § 1129(b)(2)(A) is unambiguous and permits a debtor to sell assets free of liens without credit bidding so long as it provides the secured creditor with the indubitable equivalent of its secured claim at plan confirmation. Applying the plain language of § 1129(b)(2)(A) ensures the uniform application of secured creditor protections under the Code. Section 506(a) limits a creditor's secured claim in bankruptcy to the *present value* of its collateral. It is that value that is entitled to be preserved during the course of the bankruptcy case, pursuant to § 361 and § 362(d)(1), and realized by the secured creditor at confirmation of the chapter 11 plan, pursuant to

§ 1129(b)(2)(A). Providing the indubitable equivalent of the secured claim under § 1129(b)(2)(A)(iii) where property is sold free of liens without credit bidding is entirely consistent with this scheme of protections.

Alternative canons of statutory construction do not alter the analysis. The credit bidding requirement under subsection (ii) is not "more specific" than the indubitable equivalent requirement under subsection (iii). Rather, subsection (ii) affords a *procedural* protection (a right to credit bid) that protects the creditor's interest in the present value of its collateral, whereas subsection (iii) provides a *substantive* protection (a right to the indubitable equivalent of the secured claim) that ensures the creditor will realize the present value of its collateral. Subsection (ii) therefore need not and does not limit the application of subsection (iii).

Similarly, permitting a sale of property free of liens under subsection (iii) does not render subsection (ii) superfluous. In some circumstances, a debtor may be unable to provide its secured creditor with cash or property at least equal to the secured claim immediately upon confirmation and thus may prefer to sell the collateral with credit bidding. Likewise, when the creditor's total claim is close to the estimated value of its collateral, the debtor may prefer an auction sale with credit bidding because it may generate a surplus for the bankruptcy estate. Finally, when a debtor wants to dispose of unnecessary property in bankruptcy, it may wish to conduct an auction with credit bidding rather than meet the indubitable equivalent standard under subsection (iii) at confirmation.

The Seventh Circuit turned away from the plain language of § 1129(b)(2)(A) in its decision. It found the statute ambiguous based on the purported absence of any indication in the statutory text whether subsection (iii) can apply to any type of chapter 11 plan or whether it is limited only to plans not covered under subsections (i) and (ii). In reaching this conclusion, the court dismissed in a footnote Congress' use of the word "or" to connect the three subsections. It interpreted § 1129(b)(2)(A) to limit subsection (iii) to situations in which subsections (i) and (ii) could not apply. That holding offends the plain language of the statute and this Court's well-established precedents on statutory construction by judicially crafting a limitation in subsection (iii) that does not appear in the statutory text.

The Seventh Circuit's ruling also conflicts with two better-reasoned court of appeals decisions that interpreted § 1129(b)(2)(A) to permit a sale of property free of liens without credit bidding. The Third Circuit's decision in *Philadelphia Newspapers* and the Fifth Circuit's decision in *Pacific Lumber* demonstrate how a faithful application of the plain language of § 1129(b)(2)(A) produces an optimal outcome in bankruptcy—confirmation of a chapter 11 plan for the benefit of *all* creditors instead of liquidation for the benefit of only the secured creditor.

ARGUMENT

The purpose of chapter 11 of the Bankruptcy Code is to permit the successful rehabilitation of debtors. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984). To that end, the Code provides a wide range of procedures for restructuring a distressed enterprise or disposing of its assets in an orderly fashion. This flexibility reflects "Congress' appreciation that various approaches are necessary to address effectively the disparate situations of debtors seeking protection under the Code." *Toibb v. Radloff*, 501 U.S. 157, 164 (1991). One such approach is the orderly sale of property free of pre-bankruptcy liens. 11 U.S.C. § 1123(a)(5)(D).

The Debtors in this case proposed an auction sale of substantially all their assets free of liens to fund a chapter 11 plan for the benefit of all their creditors. In connection with the auction, the Debtors sought approval of bid procedures that would prohibit secured creditors from bidding their debt instead of cash at the auction. The bankruptcy court and the Seventh Circuit refused to approve those bid procedures, holding that the Code mandates credit bidding in all sales of collateral free of liens under a chapter 11 plan. Pet. App. 1a, 38a. That ruling disregards the plain language of § 1129(b)(2)(A)(iii), which unambiguously permits such a sale as long as the secured creditor will realize the indubitable equivalent of its claim.

A. The Plain Language of the Code Does Not Require Credit Bidding

Interpretation of the Bankruptcy Code, like all statutes, begins with the plain language of the statute

itself. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). Courts presume that Congress said in the statutory text precisely what it intended. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("[W]e begin with the understanding that Congress, 'says in a statute what it means and means in a statute what it says there.'"). Thus, where the language and structure of a statute are clear, the Court looks no further and applies the statute according to its plain meaning. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("[W]hen the words of a statute are unambiguous * * * 'judicial inquiry is complete.'"); *Ron Pair*, 489 U.S. at 241 ("[W]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'"). Because Congress took particular care in drafting the Code over the span of 10 years, it is only in the rarest case that its text is truly ambiguous. *See Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 461–62 (1999) (Thomas, J., concurring). This is not such a case.

1. Section 1129(b)(2)(A) Unambiguously Provides Three Distinct Options for Confirming a Chapter 11 Plan Over the Objection of a Secured Creditor

The primary statute upon which the Debtors rely in support of their proposed auction is 11 U.S.C. § 1129(b)(2)(A), which sets forth three alternative ways that a debtor may satisfy the "fair and equitable" requirement for confirmation of a chapter 11 plan over the dissent of a secured creditor. *See* 11 U.S.C. § 1129(b)(1) (permitting confirmation of a chapter 11 plan despite rejection by an impaired secured creditor if, among other things, the plan is "fair and equitable"

to the dissenting secured creditor). Section 1129(b)(2)(A) provides, in relevant part:

> (b)(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class *includes* the following requirements:
>
> (A) With respect to a class of secured claims, *the plan provides*—
>
> (i) (I) that the holders of such claims retain the liens securing such claims * * * to the extent of the allowed amount of such claims; and
>
> (II) that each holder of a claim of such class receive * * * deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;
>
> (ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; *or*
>
> (iii) for the realization by such holders of the indubitable equivalent of such claims.

11 U.S.C. § 1129(b)(2)(A) (emphasis added). Several features of this text compel the conclusion that a debtor may choose any one of the three alternatives

under subsections (i), (ii), or (iii) to satisfy the "fair and equitable" requirement of § 1129(b)(1).

First, the three subsections are connected by the disjunctive "or," indicating that any one of the alternatives alone can satisfy the fair and equitable requirement. This reading comports with the Code's rules of construction, which instruct that "'or' is not exclusive." 11 U.S.C. § 102(5); *see also* 11 U.S.C.A. § 102 (West 2011) (Revision Notes and Legislative Reports) (statutory note further explaining that "[p]aragraph (5) specifies that 'or' is not exclusive. Thus, if a party 'may do (a) or (b)', then the party may do either or both. The party is not limited to a mutually exclusive choice between the two alternatives."). Likewise, *Black's Law Dictionary* defined "or" as "[a] disjunctive particle used to express an alternative or to give a choice of one among two or more things * * *."). BLACK'S LAW DICTIONARY 1095 (6th ed. 1990).

Second, the phrase "the plan provides" at the beginning of § 1129(b)(2)(A) demonstrates that it is the plan proponent—in this case, the Debtors—that selects which of the three alternatives to pursue. Thus, as long as the plan is designed to meet any one of the three alternatives set forth in § 1129(b)(2)(A), it will be deemed fair and equitable with respect to an objecting secured creditor.

Third, Congress' use of the term "includes" in the opening clause of § 1129(b)(2) demonstrates that the plan proponent is not limited in its selection from the three alternatives. *See* 11 U.S.C. § 102(3) ("'includes' and 'including' are not limiting."); *see also Am. Sur. Co. of N.Y. v. Marotta*, 287 U.S. 513, 517 (1933) ("In

definitive provisions of statutes and other writings, 'include' is frequently, if not generally, used as a word of extension or enlargement rather than as one of limitation or enumeration.").

Accordingly, the plain language and structure of § 1129(b)(2)(A) unambiguously afford a debtor flexibility in meeting the "fair and equitable" standard through any of the three enumerated alternatives. Numerous courts have adopted this straightforward interpretation of § 1129(b)(2)(A)'s three alternatives. *See Philadelphia Newspapers*, 599 F.3d at 305; *Pacific Lumber*, 584 F.3d at 245–46; *Wade v. Bradford*, 39 F.3d 1126, 1130 (10th Cir. 1994); *Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters., Ltd., II (In re Briscoe Enters., Ltd. II)*, 994 F.2d 1160, 1168 (5th Cir. 1993); *In re CRIIMI MAE, Inc.*, 251 B.R. 796, 806 (Bankr. D. Md. 2000).

2. Congress Did Not Mandate Credit Bidding in All Sales of Property Free of Liens

In this case, the Debtors propose to confirm their chapter 11 plan through § 1129(b)(2)(A)(iii) by providing the Lender the "indubitable equivalent" of its claim. Nothing in the plain language of § 1129(b)(2)(A)(iii) restricts how the Debtors can meet this standard. Rather it directs that the court "shall confirm the plan" if, "with respect to a class of secured claims, the plan provides for * * * the realization by such holders of the indubitable equivalent of such claims." 11 U.S.C. §§ 1129(b)(1), 1129(b)(2)(A)(iii).

Congress knew how to limit the scope of the "indubitable equivalent" standard when it wanted to

do so. For instance, § 361(3)—the only other section of the Code that employs the phrase—provides that:

> When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by—
>
> * * *
>
> (3) granting such other relief, *other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense*, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

11 U.S.C. § 361(3) (emphasis added). Section 361(3) thus expressly limits how a debtor can provide adequate protection under the indubitable equivalent standard to something *other than* an administrative expense. In contrast, Congress did not limit how a debtor may satisfy the indubitable equivalent requirement in § 1129(b)(2)(A)(iii).[1]

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[1] Congress appears to have adopted the term "indubitable equivalent" from Judge Learned Hand's opinion in *Metropolitan Life Ins. Co. v. Murel Holding Corp. (In re Murel Holding Corp.)*, 75 F.2d 941, 942 (2d Cir. 1935). Nothing in that case suggests an inherent limitation on "indubitable equivalence." The court simply declined to read § 77B of the Bankruptcy Act to deprive a senior creditor of its money or property to benefit junior creditors unless the plan provided "a substitute of the most indubitable equivalence." *Id.* at 942.

Had Congress wanted to constrain subsection (iii) in the way the Seventh Circuit proposed, Congress could have and would have written in words of limitation, such as "*except as provided in subsections (i) and (ii) of this section*, for the realization by such holders of the indubitable equivalent of such claims." Indeed, Congress used this precise language when restricting the application of numerous other provisions of the Code. *See, e.g.*, 11 U.S.C. §§ 348(a), 362(a), 362(c), 365(f)(1), 365(g), 366(a), 502(b), 509(a), 523(c)(1), 524(e), 541(a)(1), 542(a), 547(b), 547(e)(2)(A), 549(a), 552(a), 766(h), 945(b), 1112(e), 1122(a), 1301(a), 1307(c). The lack of any restrictions in subsection (iii) is strong evidence that Congress did not intend to limit its scope or application.

Indeed, if Congress had truly intended to provide an absolute right to credit bid at all sales through chapter 11 plans, the most logical place to include that right would have been in § 1123(a)(5)(D), which authorizes the sale of estate property free of liens to implement a chapter 11 plan. That section provides:

> (a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall—
>
> * * *
>
> (5) provide adequate means for the plan's implementation, such as—
>
> * * *
>
> (D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any

> part of the property of the estate among those having an interest in such property of the estate.

11 U.S.C. § 1123(a)(5)(D). Although Congress expressly permitted the sale of property "free of any lien," it did not mandate that the secured creditor must be allowed to credit bid at such a sale.

This omission is in stark contrast to § 363(k) of the Code, which entitles a secured creditor to credit bid at a sale of its collateral outside a chapter 11 plan unless the bankruptcy court denies that right for cause:

> At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

11 U.S.C. § 363(k). Although it easily could have done so, Congress did not extend the credit bidding privileges in § 363(k) to *all* sales inside a chapter 11 plan. This omission was purposeful, as shown by the very next subsection, § 363(l), which authorizes sales of property pursuant to a chapter 11 plan:

> Subject to the provisions of section 365, the trustee may use, sell, or lease property under subsection (b) or (c) of this section, *or a plan*

> *under chapter 11*, 12, or 13 of this title may provide for the use, sale, or lease of property * * *.

11 U.S.C. § 363(l) (emphasis added).

Congress' inclusion of a presumptive credit bidding requirement in § 363(k) for all asset sales *outside* a chapter 11 plan and its omission of the same requirement in § 1123(a)(5)(D) for such sales *inside* a chapter 11 plan is compelling evidence that Congress did not intend to provide secured creditors with a right to credit bid in *all* chapter 11 cases. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Indeed, earlier this Term, the Court refused to impose an extra-textual limit on a similarly constructed statute. In *Pacific Operators Offshore, LLP v. Valladolid*, No. 10–507, 132 S. Ct. ____ (Jan. 11, 2012), the Court considered § 1333(b) of the Outer Continental Shelf Lands Act, which extends workers compensation coverage to injuries "occurring as the result of operations conducted on the outer Continental Shelf." 43 U.S.C. § 1333(b). Because the plain text of the statute did not require the injury itself to occur on the outer continental shelf, the Court held that such benefits could extend to injuries that occurred on land, as long as they resulted from operations on the shelf. *Valladolid*, slip op. 8. The Court rejected the petitioner's argument that geographic limitations contained in other subsections

of § 1333 implied that Congress meant to impose a similar limitation in that subsection, reasoning that "Congress' decision to specify, in scrupulous detail, exactly where the other subsections of § 1333 apply, but to include no similar restriction on injuries in § 1333(b), convinces us that Congress did not intend § 1333(b) to apply only to injuries suffered on the OCS." *Id.*

The same analysis applies here. Congress' decision to specify a credit bidding requirement in § 363(k) for all property sales free of liens outside a chapter 11 plan, but to include no similar requirement in § 1123(a)(5)(D) for property sales free of liens through a chapter 11 plan is convincing evidence that Congress did not intend to impose an absolute right to credit bid in chapter 11.

B. Applying the Plain Language of § 1129(b)(2)(A) Ensures Consistency in Protections for Secured Creditors

This Court has long recognized that statutory interpretation is a "holistic endeavor" and that a specific provision may be clarified by its relationship to the rest of the statutory regime. *See, e.g., United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) ("*Timbers*"). A review of the Code's broader scheme of secured creditor protections confirms that the plain language of § 1129(b)(2)(A) permits a sale of assets free of liens without credit bidding as long as the secured creditor will realize the indubitable equivalent of its secured claim under subsection (iii).

1. The Code Protects the Present Value of the Secured Creditor's Collateral in Bankruptcy

At the outset of a bankruptcy case, § 506(a) bifurcates an undersecured creditor's claim into two separate claims: (1) a secured claim equal to the present value of the underlying collateral; and (2) an unsecured deficiency claim equal to the remaining balance of the claim. *See* 11 U.S.C. § 506(a)(1). For example, a secured creditor owed $100,000 secured by property valued at $70,000 as of the bankruptcy filing would have a secured claim of $70,000 and an unsecured deficiency claim of $30,000.

The Code protects the secured claim by preserving the creditor's interest in the value of its collateral during the bankruptcy case. If that value declines, the secured creditor is entitled to "adequate protection" of its interest or relief from the automatic stay to foreclose on its collateral under § 362(d)(1). Thus, if the value of the property declines from $70,000 to $50,000 during the course of the case, the creditor is entitled to adequate protection of its declining interest ($20,000) or relief from the stay. *See* 11 U.S.C. § 362(d)(1). To satisfy that adequate protection requirement, the debtor may provide cash payments, replacement collateral, or anything else (other than an administrative expense claim) that constitutes the indubitable equivalent of the creditor's declining interest. 11 U.S.C. § 361. In this way, the Code preserves the secured creditor's right to the present value of its collateral during the course of the bankruptcy case.

At plan confirmation, § 1129(b)(2)(A) ensures that the secured creditor will *realize* the present value of its collateral. Section 506(a) once again sets the amount of the secured claim equal to the present value of the collateral as of the effective date of the plan. 11 U.S.C. § 506(a)(1) ("Such value shall be determined in light of the purpose of the valuation * * * and in conjunction with any hearing * * * on a plan affecting such creditor's interest."). That secured claim is entitled to "fair and equitable" treatment under § 1129(b)(1). Section 1129(b)(2)(A) sets forth the three alternative ways to satisfy the fair and equitable requirement, each of which ensures that the secured creditor will realize at least the present value of its collateral when the plan is confirmed.

Under subsection (i), a debtor may retain or transfer the collateral subject to the liens and provide the secured creditor deferred cash payments that total the allowed amount of its secured claim and have a present value at least equal to the current value of its collateral. 11 U.S.C. § 1129(b)(2)(A)(i). Subsection (i) thus guarantees the secured creditor a stream of payments over the life of the plan with a present value equal to the value of the collateral as of the effective date of the plan.

Under subsection (ii), the secured creditor has the presumptive right to credit bid at the sale of its collateral free of liens. This allows the secured creditor to purchase its collateral through a winning credit bid at the sale. Thus, subsection (ii) also ensures that the creditor has the ability to realize the current value of its collateral.

Under subsection (iii), a debtor must provide its secured creditor with the indubitable equivalent of the creditor's secured claim; that is, property at least equal to the present value of the collateral. Subsection (iii) thus provides the secured creditor with the same benefit required under subsections (i) and (ii): the right to realize the present value of its collateral at plan confirmation. Permitting a sale of collateral free of liens under subsection (iii) is entirely consistent with this scheme of secured creditor protections because the secured creditor will receive property at least equal to the present value of its collateral.

For example, assume again that a creditor has a $100,000 claim secured by property valued at $70,000. Under subsection (i), the secured creditor is entitled to deferred cash payments with a present value equal to the property's current value, $70,000. If the property is sold free of liens under subsection (ii), the secured creditor is entitled to bid up to the full amount of its $100,000 claim to obtain the property, worth $70,000. Finally, if the property is sold free of liens under subsection (iii), the secured creditor is entitled to the indubitable equivalent of its secured claim, which again is $70,000. Under each scenario, the Code ensures that the secured creditor will realize the present value of its collateral ($70,000) at plan confirmation. *See Timbers*, 484 U.S. at 377 (recognizing that "under § 1129(b) a secured claimant has a right to receive under a plan the present value of his collateral").

Thus, while § 361 and § 362(d)(1) preserve the present value of the secured creditor's interest in its collateral during the bankruptcy case, § 1129(b)(2)(A) ensures the realization of that interest at plan

confirmation. These sections work together to protect a secured creditor's interest in the present value of its collateral at all times. Applying the plain language of § 1129(b)(2)(A) to permit the sale of collateral free of liens under subsection (iii) serves this overarching objective.

2. The Code Separately Protects the Secured Creditor's Deficiency Claim

Although § 506(a) limits an undersecured creditor's secured claim to the present value of its collateral in bankruptcy, it provides the creditor with a separate unsecured deficiency claim equal to the remaining amount, regardless of whether the creditor contractually bargained for such rights. *See* 11 U.S.C. § 1111(b)(1). This gives a secured creditor significant additional protections. For example, the secured creditor may separately vote its deficiency claim at plan confirmation. 11 U.S.C. § 1126(a). It is also protected from unfair discrimination against its deficiency claim. 11 U.S.C. § 1129(b)(1). Furthermore, the secured creditor's deficiency claim is generally classified with all other general unsecured claims. 11 U.S.C. §§ 1122(a), 1129(a)(10); *see also John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs.*, 987 F.2d 154, 159–61 (3d Cir. 1993) (Alito, J.). This right often enables the secured creditor to control the vote of the general unsecured creditor class, which frequently allows it to block confirmation of the plan. 11 U.S.C. §§ 1126(c) (requiring the vote of at least two-thirds in amount and more than one-half in number of claims in a class voting on the plan to accept it), 1129(a)(10) (requiring at least one accepting impaired class to confirm a plan). The secured creditor is also guaranteed to receive at least as much as it would

have received in a chapter 7 liquidation. 11 U.S.C. § 1129(a)(7)(A)(ii) (the "best interests" test). Finally, the Code ensures that the secured creditor's deficiency claim will be paid in full before any subordinate claims or interests receive or retain property. 11 U.S.C. § 1129(b)(2)(B)(ii) (the "absolute priority" rule).

The Code therefore provides a broad range of secured creditor protections in chapter 11 designed to protect both the secured creditor's interest in the value of its collateral as well as its unsecured deficiency claim. Yet in this case, the Lender claims that these protections are not enough, and that secured creditors must have the additional right to realize the upside potential of their collateral through credit bidding at any sale of that collateral. To try to convince the Court to reach this result, the Lender must stray outside the plain language of § 1129(b)(2)(A).

C. Other Statutory Interpretation Tools Cannot and Do Not Override the Plain Language of § 1129(b)(2)(A)

Courts often look to canons of construction to assist with the interpretation of statutes when the language is unclear. But the Court has cautioned that "canons of construction are no more than rules of thumb that help courts determining the meaning of legislation," and courts should always turn first to the "cardinal canon" of applying the plain language of the statute. *Germain*, 503 U.S. at 253–54; *Lamie v. United States Trustee*, 540 U.S. 526, 536 (2004) ("We should prefer the plain meaning since that approach respects the words of Congress."). As demonstrated above, the plain language of § 1129(b)(2)(A)(iii) does not prohibit an auction sale of assets free of liens without credit

bidding. In any event, alternative canons of statutory construction would not change that conclusion.

1. Subsection (ii) Is Not a "Specific" Provision Superseding a "General" Subsection (iii)

One canon of construction instructs that "[w]here there is inescapable conflict between general and specific terms or provisions of a statute, the specific will prevail." NORMAN J. SINGER & J.D. SHAMBIE SINGER, 2A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46:5 (7th ed. 2007). Some have argued against applying the plain language of § 1129(b)(2)(A) by interpreting subsection (iii) as a general, catch-all provision that must be limited by the purportedly more specific subsection (ii). That argument, however, mischaracterizes the nature of these subsections.

Subsection (ii) provides secured creditors with a *procedural* protection—the right to credit bid at an auction of their collateral free of liens—without regard to the substantive outcome of the sale. If the secured creditor is afforded that procedural right (whether or not it exercises such right), it does not matter how the sale is conducted (e.g., by private sale, public auction, etc.) or what price is ultimately paid for the asset. This provision reflects Congress' determination that the procedural right to credit bid by itself protects a creditor's interest in the present value of its collateral and causes any treatment it receives under the plan to be fair and equitable.

Subsection (iii), on the other hand, provides the secured creditor with a *substantive* protection—receipt of the indubitable equivalent of its secured claim—regardless of the procedure the debtor employs to achieve that result. As long as the secured creditor receives property equal to at least the present value of its collateral, it does not matter how the debtor implements its chapter 11 plan (e.g., by retention, substitution, abandonment or sale of the collateral). In that respect, subsection (iii) is *more* exacting than subsection (ii) because it requires a debtor to actually provide the secured creditor what subsection (ii) only protects procedurally.

Indeed, receipt of cash equal to the present value of the collateral upon confirmation has many advantages. For example, the creditor can redeploy that cash to a better use. *See Till v. SCS Credit Corp.*, 541 U.S. 465, 487 (2004) (Thomas, J., concurring) (recognizing that the receipt of cash today is more valuable because it "can be invested to start earning interest immediately"). Furthermore, the secured creditor avoids the risks involved when a debtor retains its collateral over the life of a plan. *See Assocs. Commercial Corp. v. Rash*, 520 U.S. 953, 962 (1997).

Because subsection (ii) mandates a certain process while subsection (iii) mandates a certain outcome, neither subsection is more specific or more general than the other. Instead, they provide secured creditors with similar protections in two different ways. As such, the canon of construction that a specific provision should limit a more general provision in the same statute does not apply.

This conclusion comports with the Court's recent decision in *Bloate v. United States*, 130 S. Ct. 1345 (2010), which applied the "specific governs the general" canon of construction to the Speedy Trial Act. The issue in *Bloate* was whether delays resulting from preparation of a pretrial motion are automatically excluded from the 70-day period to begin a trial under 18 U.S.C. § 3161(h)(1), or instead may be excluded only upon a specific finding by the district court under 18 U.S.C. § 3161(h)(7). In resolving that issue, the Court held that the general language in § 3161(h)(1) for "[a]ny period of delay resulting from other proceedings concerning the defendant" was limited by the specific example of one such proceeding in subparagraph D, involving a "delay resulting from any pretrial motion," for which only the time "from the filing of the motion through the conclusion of the hearing" is automatically excluded. *Id.* at 1354. In that case, the "specific governs the general" canon applied because the limiting subparagraph (D) was a subset of the more general § 3161(h)(1). *Id.*

By contrast, in this case, subsection (ii) is not a limiting subset of subsection (iii). Rather, both are subsets of § 1129(b)(2)(A), which enumerates three equal and independent ways to satisfy the general "fair and equitable" requirement of § 1129(b)(1). Consequently, subsection (iii) need not yield to subsections (i) or (ii).

2. The Natural Reading of § 1129(b)(2)(A) Does Not Render Subsection (ii) Superfluous

Other critics have argued that applying the plain language of § 1129(b)(2)(A) would render subsection

(ii) superfluous. *See Philadelphia Newspapers*, 599 F.3d at 330 (Ambro, J., dissenting). In fact, permitting a sale of collateral free of liens without credit bidding under subsection (iii) does *not* nullify subsection (ii).

As explained above, subsection (iii) requires a debtor to provide the secured creditor with property at plan confirmation at least equal to the present value of its collateral. That requirement is immediate and substantial, and not all chapter 11 plans can satisfy it. For example, the sale may not generate proceeds equal to the asset's fair market value. Unless the debtor has access to additional property or new funds, it will be unable to satisfy the "indubitable equivalent" requirement of subsection (iii). In that case, a debtor may opt to pursue confirmation under subsection (ii) and simply permit the secured creditor to credit bid at the sale.

Additionally, where a debtor owns multiple properties, only some of which are necessary or desirable for an effective reorganization, the debtor may wish to sell the unneeded property and allow credit bidding to avoid having to provide the indubitable equivalent of the creditor's secured claim at confirmation under subsection (iii). Likewise, where the present value of the collateral is close to the total amount of the secured creditor's claim, a debtor may prefer to allow credit bidding under subsection (ii) because it may generate a surplus for the estate and avoid any need to satisfy the indubitable equivalent requirement at confirmation. Finally, in some cases secured creditors may negotiate credit bid rights in debtor-in-possession financing agreements and cash collateral orders in bankruptcy that would preclude a

sale of collateral without credit bidding under subsection (iii).

In sum, that § 1129(b)(2)(A) permits a sale without credit bidding under subsection (iii) does not mean that *all* such sales will proceed under subsection (iii) rather than subsection (ii).

3. Secured Creditors Are Not Entitled to the Potential Future Appreciation of Their Collateral

Critics have also argued that applying the plain language of § 1129(b)(2)(A) would deprive the secured creditor of the potential future appreciation of its collateral. Advocates of this position point to the interplay between § 363(k) and § 1111(b) of the Code as ensuring such a right for secured creditors. *See Philadelphia Newspapers*, 599 F.3d at 332–34 (Ambro, J., dissenting).

Section 1111(b)(2) permits an undersecured creditor, in certain circumstances, to elect to have its entire claim treated as fully secured regardless of the value of its underlying collateral (the § 1111(b) election). *See Dewsnup v. Timm*, 502 U.S. 410, 430 n.3 (1992) (Scalia, J., dissenting) (describing the effect of the § 1111(b) election). For example, a creditor owed $100,000 secured by property currently valued at $70,000 may elect to have its entire $100,000 claim treated as fully secured under § 1111(b)(2), even though the property is only worth $70,000. In a reorganization plan in which a debtor retains the collateral, this election provides the secured creditor with a lien equal to the full amount of its claim ($100,000) regardless of the value of its collateral

($70,000). Thus, although the undersecured creditor waives a deficiency claim and its attendant rights, it retains a lien on its collateral equal to the full amount of its claim. This supposedly protects against a debtor cramming down the creditor's secured claim at a low point in valuation under § 1129(b)(2)(A)(i) and then later selling the collateral at a higher price, paying off the lien, and keeping the surplus for itself.

A secured creditor may not make the § 1111(b) election if its collateral is sold under § 363 or through a chapter 11 plan. *See* 11 U.S.C. § 1111(b)(1)(B)(ii). This has caused some to argue that a secured creditor must always have the right to credit bid when its collateral is sold. Like the § 1111(b) election, credit bidding supposedly protects the secured creditor against a third party buying its collateral free of liens when prices are depressed. Accordingly, these critics argue that the Code guarantees secured creditors one of these two supposedly fundamental rights—either the § 1111(b) election when the debtor keeps the collateral or credit bidding when the debtor sells the collateral. This syllogism is undermined, however, by numerous situations where the Code provides *neither* protection.

First, if a debtor transfers collateral subject to a lien to a third party under § 1129(b)(2)(A)(i), the secured creditor is not entitled to make the § 1111(b) election because the collateral is sold. 11 U.S.C. § 1111(b)(1)(B)(ii). But the secured creditor is also not entitled to credit bid because subsection (i), like subsection (iii), does not incorporate the right to credit bid.

Second, § 363(k) itself expressly permits the bankruptcy court, for cause, to deny the right to credit bid in the sale of collateral. 11 U.S.C. § 363(k) ("unless the court for cause orders otherwise the holder of such claim may bid at such sale"). The cause exception in § 363(k), however, is generally reserved for creditor malfeasance or priority disputes among lien holders. *See, e.g.*, Daniel P. Winikka & Debra K. Simpson, *Will Bankruptcy Courts Limit the Right to Credit Bid?*, 17 J. BANKR. L. & PRAC. 6 art. 6 (Sept. 2008) (recognizing that "courts thus far have found cause to alter or eliminate a creditor's right to credit bid [under § 363(k)] only in situations involving collusion or a failure to provide for, or satisfy, a senior or pari passu lien."). Consequently, the Debtors were unable to demonstrate cause in this case.

Third, a creditor may not make the § 1111(b) election if its interest in the collateral is of inconsequential or no value (e.g., in the case of an out-of-the-money second lien creditor). 11 U.S.C. § 1111(b)(1)(B)(i). As a result, if the bankruptcy is filed at a time of depressed asset values, rendering the formerly well-secured creditor totally unsecured, that creditor has no right to share in the upside of its collateral.

Finally, even where the creditor makes the § 1111(b) election, it still is not guaranteed to participate in the future appreciation of its collateral. The Code expressly allows a debtor to modify a lien to implement its chapter 11 plan. *See* 11 U.S.C. § 1123(a)(5)(E). Such modifications can include eliminating a due-on-sale clause. *See, e.g., Airadigm Commc'ns, Inc. v. FCC (In re Airadigm Commc'ns, Inc.)*, 519 F.3d 640, 654–55 (7th Cir. 2008). Doing so

would allow a debtor to cram down the secured creditor under § 1129(b)(2)(A)(i) and later sell the collateral subject to the lien and retain the benefit of the collateral's future appreciation for itself. The secured creditor, meanwhile, would be entitled only to retain its lien and continue to receive payments under the plan from the new buyer.

These examples demonstrate that the Code does *not* in all circumstances protect a secured creditor's right to participate in any potential future appreciation of its collateral. *See Dewsnup*, 502 U.S. at 430 (Scalia, J., dissenting) (recognizing that chapter 11 does not provide secured creditors the right to "demand the benefit of postvaluation increases in the value of property given as security"). Instead, it protects the *present value* of the collateral, as reflected in the plain language of § 1129(b)(2)(A).

4. The Legislative History Is Unclear and Cannot Override the Plain Language of § 1129(b)(2)(A)

Because the text of § 1129(b)(2)(A) is unambiguous, the Court should not rely on extrinsic sources, such as legislative history, to reach a different interpretation. *See Ron Pair*, 489 U.S. at 240–41 ("[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute."). Indeed, the Court frequently notes the unreliability of legislative history in construing the meaning of a statute. *See Exxon Mobil Corp. v. Allapattah Serv., Inc.*, 545 U.S. 546, 568 (2005) ("[L]egislative history in particular is vulnerable to two serious criticisms. First, legislative history is itself often murky, ambiguous, and

contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in 'looking over a crowd and picking out your friends.'"); *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) ("If one were to search for an interpretive technique that, *on the whole*, was more likely to confuse than to clarify, one could hardly find a more promising candidate than legislative history.") (emphasis in original). "The risks of relying on such practice in interpreting the Bankruptcy Code, which seeks to bring an entire area of law under a single, coherent statutory umbrella, are especially weighty." *203 North LaSalle*, 526 U.S. at 461 (Thomas, J., concurring).

The legislative history of § 1129(b)(2)(A) is particularly unenlightening. For example, certain comments made by Representative Edwards, one of the principal drafters of the Code, support the disjunctive nature of § 1129(b)(2)(A): "[t]he court must confirm the plan notwithstanding the dissent of such a class of secured claims if *any* of three alternative requirements is met," and "[c]lause (iii) *requires* the court to confirm the plan notwithstanding the dissent of the electing secured class if the plan provides for the realization by the secured class of the indubitable equivalents of the secured claims." 124 CONG. REC. 32,407 (1978) (emphasis added). On the other hand, referring to § 1111(b), Representative Edwards commented, seemingly inconsistently, that "[s]ale of property under section 363 or under the plan is excluded from treatment under section 1111(b) because of the secured party's right to bid in the full amount of his allowed claim at any sale of the

collateral under section 363(k)." *Id.*[2] With respect to § 1129(b)(2)(A)(ii), Representative Edwards only commented that "[c]lause (ii) is self-explanatory." *Id.*

At most, these conflicting snippets of legislative history from different sections of the Code simply highlight just how "murky, ambiguous and contradictory" legislative history can be. *Exxon Mobil*, 545 U.S. at 568. Such "evidence" should not be used to override the plain language of § 1129(b)(2)(A). *See Lamie*, 540 U.S. at 539–42 (rejecting "competing interpretations of legislative history" to override the text of § 330(a) because it "creates more confusion than clarity about the congressional intent").

The Court should refrain from engaging in the wide-ranging string of inferences and suppositions required to interpret § 1129(b)(2)(A) contrary to its plain text. Once again, had Congress intended to limit all plan sales to subsection (ii), it could have written the statute that way. *See Lamie*, 540 U.S. at 538 ("Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding.").

D. The Seventh Circuit Misconstrued the Language and Structure of § 1129(b)(2)(A)

In its decision below, the Seventh Circuit rejected the plain meaning of § 1129(b)(2)(A), instead holding that any chapter 11 plan proposing a sale of property free of liens may only be confirmed over the dissent of

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[2] The more practical reason a creditor may not make the § 1111(b) election when its collateral is sold is that there is no longer any collateral remaining to secure the creditor's claim.

a secured creditor under § 1129(b)(2)(A)(ii), which requires credit bidding. Pet. App. 25a. The court arrived at its conclusion based on a flawed understanding of the chapter 11 process.

1. The Seventh Circuit Conflated Approval of Bid Procedures With Plan Confirmation

In framing the issue on appeal, the Seventh Circuit stated:

> The Debtors contend[ ] that the bankruptcy court misinterpreted Section 1129(b)(2)(A) of the Code when it held that their plans could not be confirmed because they did not "comply with the specific requirements of Section 1129(b)(2)(A)(ii)." They argue that their plans should have been confirmed because they satisfied the conditions set forth in Section 1129(b)(2)(A)(iii).

Pet. App. 10a. That framing reflects a subtle but important error. The order at issue is the bankruptcy court's order denying the Debtors' motion to establish *bid procedures* for their proposed auction, not an order denying *plan confirmation*. *See* Pet. App. 38a–45a. Indeed, the Debtors have not yet sought confirmation of their chapter 11 plan. The Debtors must first obtain approval of bid procedures for the auction. Only *after* those procedures are approved can the Debtors conduct the auction, determine the distribution of its proceeds, and then seek confirmation of their plan. *See* 11 U.S.C. §§ 1125, 1128.

Approval of auction bid procedures and confirmation of a plan are two separate and distinct parts of the chapter 11 process. The only question currently before the Court is whether the Debtors may proceed with the auction using bid procedures that preclude credit bidding. Because the plain language and structure of § 1129(b)(2)(A) do not foreclose that possibility as a matter of law, the answer is yes. Whether the Debtors ultimately can fulfill the confirmation requirements set forth in § 1129, including provision of the indubitable equivalent of the Lender's claim under § 1129(b)(2)(A)(iii), must be determined at plan confirmation by the bankruptcy judge, who has broad discretion to ensure those requirements (and others) are met. *See Philadelphia Newspapers*, 599 F.3d at 308 n.8 ("The question of whether a particular asset sale is 'fair and equitable' is a question for plan confirmation and cannot be *answered at this stage by manufacturing extra-textual* statutory constraints.").

Indeed, the Debtors may not be required to resort to § 1129(b)(2)(A) at all. Depending on the results of the auction and resulting distributions under the plan, the Lender may ultimately be satisfied with its treatment and vote in favor of the Debtors' chapter 11 plan, which would eliminate the need to pursue confirmation under § 1129(b)(2)(A) altogether. *See* 11 U.S.C. § 1129(b)(1) (requiring fair and equitable treatment only for a class of creditors that "is impaired under, and has not accepted, the plan").

The Seventh Circuit also mistook the Debtors as arguing that the proceeds from an auction sale of collateral free of liens without credit bidding will *always* constitute the indubitable equivalent of a

secured creditor's claim. Pet. App. 16a. Whether the "indubitable equivalent" requirement is satisfied will depend on the proceeds generated from the auction and the value of the secured creditor's claim. But it is impossible to make that determination now, when neither the amount of proceeds nor the fair market value of the collateral is known. In any event, the Code does not require the Debtors to show definitively, at this stage of the chapter 11 process, that their auction will satisfy the "indubitable equivalent" standard under § 1129(b)(2)(A)(iii). Instead, the Code requires the Debtors to satisfy that test at the plan confirmation hearing. Likewise, the Lender maintains its right to object at plan confirmation for lack of indubitable equivalence or failure to meet the "fair and equitable" requirement. In this way, the Code allows the chapter 11 process to play out, fostering further negotiation among the parties to confirm a viable chapter 11 plan. Precluding the Debtors from proceeding with the auction at this stage would have the untenable consequence of stopping the chapter 11 plan process before it starts, effectively barring bankruptcy relief for the Debtors and others whose property is worth substantially less than their secured debt.

2. The Seventh Circuit's Decision Is At Odds With the Plain Language and Structure of § 1129(b)(2)(A)

In analyzing the text of § 1129(b)(2)(A), the Seventh Circuit rejected the possibility that the statute had a plain meaning on the basis that:

> [n]othing in the text of Section 1129(b)(2)(A) directly indicates whether Subsection (iii) can

> be used to confirm any type of plan or if it can only be used to confirm plans that propose disposing of assets in ways that can be distinguished from those covered by Subsections (i) and (ii).

Pet. App. 17a. In so holding, the court was not persuaded that the statute's use of the disjunctive "or" to separate its three subparts plainly indicated Congress' intention that subsection (iii) may be used to confirm any type of plan, so long as its specific requirement—indubitable equivalence—is satisfied.

Departing from the decisions of the Third and Fifth Circuits, the Seventh Circuit dismissed in a footnote Congress' use of the word "or," reasoning that while the Code's own rules of construction require a non-exclusive application of the word, "several exceptions to this rule have been recognized." Pet. App. 17a n.5. In support of this proposition, the court cited to the dissent in *Philadelphia Newspapers*, which listed examples in the Code where the use of the word "or" was supposedly meant to be exclusive. *Id.* (citing *Philadelphia Newspapers*, 599 F.3d at 324 (Ambro, J., dissenting)).

The Seventh Circuit's scant analysis of the word "or" misconstrued its use in § 1129(b)(2)(A) and mischaracterized its use in other sections of the Code. The examples cited by the Seventh Circuit are merely instances where alternatives are mutually exclusive as a practical matter, *see* 11 U.S.C. §§ 1112(b)(1), 1325(a)(5)(B)–(C), or the alternatives themselves contain a clause limiting their application, *see* 11 U.S.C. §§ 365(g)(2)(B)(i)–(ii), 506(d)(1)–(2), 1325(b)(3)(A)–(C), 1325(b)(4)(A)(i)–(ii). Neither

condition applies here; § 1129(b)(2)(A)(iii) contains no limiting language. If a secured creditor realizes the indubitable equivalent of its secured claim, then the bankruptcy court "shall confirm the plan" despite the secured creditor's objection. 11 U.S.C. §§ 1129(b)(1), 1129(b)(2)(A)(iii). Congress deemed that sufficient protection for a secured creditor under any type of chapter 11 plan. "If Congress enacted into law something different from what it intended, then it should amend the statute to conform to its intent." *Lamie*, 540 U.S. at 542.

Unshackled by the plain language of the statute, the Seventh Circuit concluded that the more plausible interpretation of § 1129(b)(2)(A)(iii) "is one that limits it only to circumstances not otherwise covered by subsections (i) and (ii)." Pet. App. 23a–24a. This interpretation, however, imposes restrictions on subsection (iii) that do not exist in the statutory text. Congress knew how to limit the application of subsections in the Code. As discussed above, § 361 lists three ways in which a debtor may provide adequate protection, including (1) cash payments, (2) additional or replacement liens, or "(3) granting *such other relief* * * * as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property." 11 U.S.C. § 361 (emphasis added). By including the restrictive clause "such other relief" at the beginning of § 361(3), Congress clearly limited its application to something *other* than that provided by the prior two subsections, (1) and (2). But no such textual limitation appears in § 1129(b)(2)(A)(iii)—powerful evidence that Congress intended subsection (iii) to apply to *any* type of chapter 11 plan.

The Seventh Circuit further premised its ruling on the supposed ambiguity of the phrase "indubitable equivalent." Pet. App. 13a. The court observed that "[i]f a creditor's claim is undersecured, then the indubitable equivalent of the creditor's secured claim equals the current market value of the asset." Pet. App. 18a (also stating that "a reorganization plan will give the creditor the indubitable equivalent of its claim if the plan gives the creditor something worth the asset's current market value"). Nevertheless, the court was concerned that certain factors unique to bankruptcy auctions create "a substantial risk" that the asset will be sold below fair market value and the secured creditor might not receive the indubitable equivalent of its claim, justifying its need to credit bid. Pet. App. 20a. In making this quasi-legislative determination, the court rejected the possibility that *any* plan involving the sale of assets could be confirmed under *§ 1129(b)(2)(a)(iii)*. Pet. App. 21a ("Nothing in the text of Section 1129(b)(2)(A) indicates that plans that *might* provide secured lenders with the indubitable equivalent of their claims can be confirmed under Subsection (iii).") (emphasis in original). This too was error.

As explained above, whether the Debtors can ultimately satisfy the "indubitable equivalent" standard for cramdown under § 1129(b)(2)(A)(iii) cannot be determined now, but rather must be evaluated by the bankruptcy judge at plan confirmation. Any perceived risk that the bankruptcy auction *might not generate proceeds equal to the fair* market value of the collateral sold is an insufficient reason to rule out the possibility that a debtor may nonetheless satisfy the "indubitable equivalent" standard of § 1129(b)(2)(A)(iii) at that time.

For instance, the auction might generate proceeds that appraisals and other indications of value confirm equal or exceed the fair market value of the collateral sold. Indeed, it is not unusual for a buyer at a bankruptcy auction to pay a price higher than expected for strategic or emotional reasons. Bankruptcy auctions are widely advertised and dynamic, often generating significantly greater value than a foreclosure sale. *See In re Canonigo*, 276 B.R. 257, 262 (Bankr. N.D. Cal. 2002) ("generally speaking, a voluntary sale by the estate will bring a higher price than a foreclosure sale by a senior lienholder"); *In re Kirchner*, 216 B.R. 417, 422 n.12 (Bankr. W.D. Wis. 1997) ("There may be reason to believe that a sale in bankruptcy is likely to yield a higher price than a foreclosure sale"); *In re R.L. Kelly & Sons, Millers*, 125 B.R. 945, 957 (Bankr. D. Md. 1991) ("[I]t is likely the trustee may be able to realize a higher sale price from a market sale than a creditor would receive at a foreclosure sale."). Moreover, the debtor could supplement the sale proceeds with additional property to satisfy the indubitable equivalent standard. For example, in *Philadelphia Newspapers* the debtors proposed giving the secured creditors the proceeds from the auction and a parcel of real property in satisfaction of their secured claim under § 1129(b)(2)(A)(iii). *Philadelphia Newspapers*, 599 F.3d at 312 ("[Indubitable equivalence] can include not only the cash value generated by the public auction, but other forms of compensation or security such as substituted collateral or, as here, real property.").

In sum, the Seventh Circuit incorrectly interpreted § 1129(b)(2)(A) to foreclose the possibility that a debtor may sell property free of liens without credit bidding and nonetheless provide its secured creditor with the

indubitable equivalent of its claim under subsection (iii) at plan confirmation.

E. The Third and Fifth Circuits Correctly Applied the Plain Language of § 1129(b)(2)(A)

An analysis of the contrary decisions by the Third and Fifth Circuits confirms that the plain language of § 1129(b)(2)(A) reflects Congress' careful balance between protecting secured creditor interests and fostering the reorganization and rehabilitation of distressed debtors.

1. The Majority Opinion in *Philadelphia Newspapers* Reflects the Proper Analysis of § 1129(b)(2)(A)

In *Philadelphia Newspapers*, the Third Circuit affirmed the approval of bid procedures for an auction sale of collateral free of liens nearly identical to the bid procedures at issue in this case. In a thorough and well-reasoned opinion, the majority recognized that the plain language and structure of § 1129(b)(2)(A) provide a debtor with three alternative paths to plan confirmation. *See Philadelphia Newspapers*, 599 F.3d at 305 ("The use of the word 'or' in this provision operates to provide alternatives—a debtor may proceed under subsection (i), (ii) *or* (iii), and need not satisfy more than one subsection.") (emphasis in original). The majority rejected the secured creditor's argument that the supposedly general indubitable equivalent standard in subsection (iii) must yield to the supposedly specific credit-bidding requirement of subsection (ii). Citing extensively to the Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489 (1996),

the majority noted that this canon of statutory construction applies only where the more specific provision expressly limits the general provision, and that § 1129(b)(2)(A) contains no such limitation. *Philadelphia Newspapers*, 599 F.3d at 308 ("Although subsection (ii) specifically refers to a 'sale' and incorporates a credit bid right under § 363(k), we have no statutory basis to conclude that it is the only provision under which a debtor may propose to sell its assets free and clear of liens.").

The majority observed that the secured creditor's interpretation of the statute would produce the strange result of rejecting a chapter 11 plan that fully compensated the creditor for its secured claim by providing the indubitable equivalent under subsection (iii) simply because it failed to provide the right to credit bid at the auction under subsection (ii). *Id.* at 308–09. Taking this point one step further underscores the absurdity of this result. Assume a creditor is owed $100,000 secured by a lien on property that is appraised for a current value of $70,000 and is sold free of liens at an auction in bankruptcy for $90,000, with all of the cash proceeds to be remitted directly to the creditor in full satisfaction of its secured claim. Under the Lender's restrictive interpretation of § 1129(b)(2)(A), that plan could still not be confirmed even though the creditor would receive *more* than its secured interest simply because the creditor was not allowed to credit bid. "Reading the statute in this manner significantly curtails the ways in which a debtor can fund its reorganization—an outcome at odds with the fundamental function of the asset sale, to permit debtors to 'provide adequate means for the plan's implementation.'" *Id.* at 309 (citing 11 U.S.C. § 1123(a)(5)(D)).

The majority likewise rejected the argument that § 363(k) and § 1111(b) together entitle secured creditors to realize something more than their secured claim, reasoning that "such preferential treatment is plainly contrary to other provisions of the Code." *Id.* at 316 (explaining well-recognized limitations to § 363(k) and § 1111(b)). Finally, the majority concluded that the legislative history failed to provide the "extraordinary showing of contrary intentions" by Congress required to override the plain language of § 1129(b)(2)(A). *Id.* at 317.

The dissenting judge in *Philadelphia Newspapers* acknowledged that the majority's application of the plain language of § 1129(b)(2)(A) is plausible, but nonetheless disagreed with the holding because he was "convinced this is not what Congress intended when it drafted the Bankruptcy Code." *Id.* at 319 (Ambro, J., dissenting). The dissent then engaged in a wide-ranging analysis of alternative canons of statutory construction, secured creditor protections found in other sections of the Code and under non-bankruptcy law, and bits of legislative history to arrive at an alternative interpretation. The dissent's analysis, however, is unpersuasive in light of the plain language and structure of the statute. Indeed, the concurring opinion aptly noted the "near-gymnastics" used by the dissent to justify a conclusion at odds with the statutory text. *Id.* at 318–19 (Smith, J., concurring).

In closing, the dissent warned that applying the plain language of § 1129(b)(2)(A) would "upset[] three decades of secured creditors' expectations, thus increasing the cost of credit." *Id.* at 338 (Ambro, J., dissenting). Those concerns proved unfounded. The auction in *Philadelphia Newspapers* went forward and

produced spirited cash bidding with the secured lenders submitting the winning bid totaling approximately $105 million in cash, nearly triple the amount of the initial cash bid ($37 million) offered in connection with the asset purchase agreement. *See* Yitzhak Greenberg, *Credit Bidding After* Philadelphia Newspapers: *The Fat Lady Has Not Sung*, 2011 NO. 7 NORTON BANKR. L. ADVISER 2 (July 2011). The majority's application of the plain language of § 1129(b)(2)(A) produced an optimal result, maximizing the value of the bankruptcy estate and permitting the debtors to confirm a chapter 11 plan for the benefit of all their stakeholders, not just the secured creditors. Furthermore, the secured creditors were still able to protect their interest in the collateral by submitting the winning cash bid, which was largely returned to them through the plan. Thus, *Philadelphia Newspapers* highlights how the faithful application of the plain language of § 1129(b)(2)(A) enacted by Congress maintains the careful balance of competing interests established by the Bankruptcy Code.

2. *Pacific Lumber* Illustrates How § 1129(b)(2)(A) Provides Flexibility to Achieve an Equitable Result Consistent With the Underlying Policies of the Bankruptcy Code

Shortly before *Philadelphia Newspapers*, the Fifth Circuit affirmed the confirmation of a chapter 11 plan under similar circumstances. The debtors in that case owned a sawmill, power plant, and town as well as a vast stretch of prime redwood timberland in northern California. *Pacific Lumber*, 584 F.3d at 236. Upon the termination of the debtors' exclusive period to file a plan under § 1121, two different chapter 11 plans were

proposed: one by the debtors' secured noteholders seeking to liquidate only the timberland assets; the other from a group seeking to purchase and reorganize all of the debtors' assets. *Id.* The bankruptcy court confirmed the latter plan over the noteholders' objection, ruling that a cash payment equal to the judicially determined value of the noteholders' collateral satisfied the indubitable equivalent standard of § 1129(b)(2)(A)(iii). The noteholders appealed the decision to the Fifth Circuit, claiming that they were improperly denied the right to credit bid at the sale of their collateral.

Writing through noted bankruptcy expert Chief Judge Edith Jones, the Fifth Circuit affirmed, reasoning that while § 1129(b)(2)(A)(ii), which requires credit bidding, *could* have applied, it was not the *exclusive* means to confirm a plan involving the sale of property free of liens in chapter 11. *Id.* at 245–46. The court rejected the noteholders' argument that allowing sales free of liens under subsection (iii) would render subsection (ii) superfluous, reasoning that "Congress did not adopt indubitable equivalent as a capacious but empty semantic vessel" and that indubitable equivalent is "no less demanding a standard than its companions." *Id.* at 246. The court likewise rejected the notion that the Code ensures a secured creditor's right to the potential future appreciation of its collateral, correctly noting that the Code "does not protect a secured creditor's upside potential; it protects the 'allowed secured claim.'" *Id.* at 247.

Applying the plain meaning of § 1129(b)(2)(A) allowed the court in that case to confirm a chapter 11 plan that benefited all stakeholders. Had the Fifth Circuit adopted the noteholders' constrained

interpretation, the secured creditor would have simply liquidated its interest in the timberland assets, leaving the rest of the debtor's stakeholders—including the employees of the sawmill, power plant, and town—with nothing.

F. Following the Plain Language of § 1129(b)(2)(A) Is Consistent With the Flexible and Rehabilitative Purposes of Bankruptcy

In line with its underlying policies of flexibility and equity, the Bankruptcy Code offers numerous different ways in which a debtor may seek to reorganize. *See Bildisco*, 465 U.S. at 525. The three alternatives provided under § 1129(b)(2)(A) embody this flexible approach, permitting a debtor to design and confirm a chapter 11 plan over the dissent of an undersecured creditor in various ways. The Lender's restrictive reading of this section not only offends the plain language and structure of the statute, but also undermines the fundamental purpose of chapter 11 "to permit successful rehabilitation of debtors." *Id.* at 527. Indeed, such an interpretation would severely limit the ability of a broad group of distressed entities with severely depressed asset values to reorganize under the protections of the Code at a time when such protections are needed most—an outcome antithetical to the flexible and rehabilitative goals of the Code. *See id.* at 524–25 (rejecting a "very strict" interpretation of Section 365(a) as "fundamentally at odds with the policies of flexibility and equity built into Chapter 11 of the Bankruptcy Code").

As this case illustrates, a debtor is often unable to attract new equity to fund a reorganization under

subsection (i) where the outstanding secured debt far exceeds the current value of the enterprise because it is not feasible to satisfy the secured creditor's total claim when the § 1111(b) election is made. *See* 11 U.S.C. § 1129(a)(11) (requiring plan feasibility for confirmation). Likewise, a debtor often cannot effectively sell its assets free of liens under subsection (ii) because the secured creditor can credit bid the full amount of its claim (which far exceeds the current value of the collateral) and take back its collateral, leaving no cash available to fund a chapter 11 plan for creditors. Under either of these circumstances, the bankruptcy court likely will grant the secured creditor relief from the automatic stay to foreclose on its collateral. *See* 11 U.S.C. §§ 362(d)(1), 362(d)(2). Thus, a debtor's only option to confirm a plan to benefit all creditors may be to sell assets free of liens without credit bidding under subsection (iii). This economic reality was not lost on the bankruptcy judge below. *See* Pet. App. 37a ("Notwithstanding the debtors' reference to alternative resolutions, the huge difference between the value of the real estate and the amounts owed the lenders, the proposed sale precluding credit bidding appears to this bankruptcy judge to be the only realistic hope the debtors have to confirm a plan in chapter 11." (footnote omitted)).

This reality illustrates how, under circumstances such as these, credit bidding does not benefit the bankruptcy estate. Unlike bidding with cash, a credit bid may only be used by the secured creditor at a sale of its collateral. As such, the creditor has little reservation in bidding the full amount of its claim regardless of the actual value of the collateral. Because its total claim far exceeds any reasonable estimate of the current value of the collateral, a right to credit bid

at all plan sales would ensure that the creditor can trump any other third-party cash bids and take back its collateral—defeating the purpose of the auction and depriving the debtor of any effective way to implement a chapter 11 plan. *Cf.* 11 U.S.C. § 1123(a)(5)(D) (expressly allowing a debtor to sell property free of liens to implement a chapter 11 plan). Consequently, requiring credit bidding for all plan sales under subsection (ii) effectively provides the secured creditor with an unconditional veto over the chapter 11 process when the secured creditor's total claim far exceeds the present value of its collateral. The Code does not give secured creditors this extraordinary power.

By contrast, applying the plain language of § 1129(b)(2)(A) gives a debtor flexibility to fulfill its fiduciary obligation to confirm a chapter 11 plan for the benefit of all its creditors, not just the secured creditor. *See 203 N. LaSalle*, 526 U.S. at 453 (recognizing the two underlying policies of Chapter 11 "of preserving going concerns and maximizing property available to satisfy creditors"). It also reinforces the rehabilitative goals of the Code even in especially challenging economic times, which, in turn, fosters entrepreneurial risk-taking that is central to our free-market economy.

G. This Case Is Not Moot

The Lender has repeatedly attempted to avoid review of its victory below by arguing mootness. This argument incorrectly shifts the focus from the bid procedures on appeal to the underlying asset purchase agreement and chapter 11 plan, neither of which was considered by the bankruptcy court below. Both the bankruptcy court and the Seventh Circuit have

correctly rejected the Lender's mootness claim. *See* Pet. App. 7a–9a.

A case is moot only if the issue presented is no longer live or the parties lack a cognizable interest in the outcome. *Powell v. McCormack*, 395 U.S. 486, 496 (1969). The Court has described a legally cognizable interest as "'definite and concrete, touching the legal relations of parties having adverse legal interests. * * * It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240–41 (1937)).

In this case, a live controversy plainly exists. The Debtors are still pursuing their proposed auction and the parties continue to vigorously contest whether the Code gives the Lender the absolute right to credit bid at the auction. Likewise, the parties have a legally cognizable interest in the outcome of this appeal. If the Court agrees with the Debtors' reading of § 1129(b)(2)(A) and reverses the decision below, the Debtors will implement their bid procedures precluding the Lender from credit bidding at the auction. This controversy thus "touch[es] the legal relations of parties having adverse legal interests," and a decision from the Court will provide "specific relief through a decree of a conclusive character" in this bankruptcy case. *Rice*, 404 U.S. at 246. The bankruptcy court acknowledged this point in certifying a direct appeal to the Seventh Circuit. *See* Pet. App. 37a ("[A]n immediate appeal will materially advance the progress of this case by settling whether the

debtors may proceed with their proposed chapter 11 plan.").

The crux of the Lender's mootness argument is that the Debtors have abandoned their asset purchase agreement and chapter 11 plan. The question presented in this case, however, relates only to the Debtors' proposed *bid procedures*. In any event, the Debtors have filed an amended asset purchase agreement and amended chapter 11 plan, both of which are nearly identical to their predecessors except that (1) the purchase price has increased to account for the recent appreciation of the Debtors' assets, and (2) certain deadlines for the sale have been extended, reflecting the buyer's continued interest in participating in the proposed auction. J.A. 174, 255. Recognizing the Debtors' and the buyer's continued intent to pursue the sale through a plan, the bankruptcy court has twice denied the Lender's request to modify the automatic stay to foreclose.

Even if this appeal were technically moot (which it is not), it would nonetheless fit squarely within the well-established exception to mootness allowing cases to proceed if they raise issues that are capable of repetition, yet evade review. This exception applies where (1) the challenged action is too short in duration to be fully litigated before cessation or expiration, and (2) there is a reasonable expectation that the same party will be subject to the same action again. *See FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007).

This case readily satisfies both prongs of the test. *See* Pet. App. 9a. First, asset sales in bankruptcy typically require short deadlines to protect the parties from market fluctuations, dissipation of value, and

other unforeseen events. Second, if the appeal were dismissed as moot, the Debtors would simply renew their motion in the bankruptcy court to approve the same bid procedures with a new asset purchase agreement, which would be subject to the same adverse ruling. The Debtors would be forced into a position where they could never seek appellate review of their proposed bid procedures because the inherently short deadlines required for such a sale would inevitably expire before the litigation has run its course. This is precisely the dilemma that the "capable of repetition, yet evading review" exception is designed to avoid. Indeed, if this case were deemed moot, it is difficult to imagine how any chapter 11 plan confirmation issue could survive long enough to be reviewed by the Court.

CONCLUSION

The decision of the Seventh Circuit should be reversed and the case remanded to the bankruptcy court for consideration of the Debtors' bid procedures motion under the correct statutory interpretation.

Respectfully submitted,

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APPENDIX

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APPENDIX

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 102

§ 102. Rules of construction

In this title—

(1) "after notice and a hearing", or a similar phrase—

(A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances; but

(B) authorizes an act without an actual hearing if such notice is given properly and if—

(i) such a hearing is not requested timely by a party in interest; or

(ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act;

(2) "claim against the debtor" includes claim against property of the debtor;

(3) "includes" and "including" are not limiting;

(4) "may not" is prohibitive, and not permissive;

(5) "or" is not exclusive;

(6) "order for relief" means entry of an order for relief;

(7) the singular includes the plural;

(8) a definition, contained in a section of this title that refers to another section of this title, does not, for the purpose of such reference, affect the meaning of a term used in such other section; and

(9) "United States trustee" includes a designee of the United States trustee.

11 U.S.C. § 363(k)

§ 363. Use, sale, or lease of property

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

11 U.S.C. § 1111(b)

§ 1111. Claims and interests

(b)(1)(A) A claim secured by a lien on property of the estate shall be allowed or disallowed under section 502 of this title the same as if the holder of such claim had recourse against the debtor on account of such claim, whether or not such holder has such recourse, unless—

(i) the class of which such claim is a part elects, by at least two-thirds in amount and more than half in number of allowed claims of such class, application of paragraph (2) of this subsection; or

(ii) such holder does not have such recourse and such property is sold under section 363 of this title or is to be sold under the plan.

(B) A class of claims may not elect application of paragraph (2) of this subsection if—

(i) the interest on account of such claims of the holders of such claims in such property is of inconsequential value; or

(ii) the holder of a claim of such class has recourse against the debtor on account of such claim and such property is sold under section 363 of this title or is to be sold under the plan.

(2) If such an election is made, then notwithstanding section 506(a) of this title, such claim is a secured claim to the extent that such claim is allowed.

11 U.S.C. § 1123(a)(5)

§ 1123. Contents of plan

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall—

(5) provide adequate means for the plan's implementation, such as—

(A) retention by the debtor of all or any part of the property of the estate;

(B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;

(C) merger or consolidation of the debtor with one or more persons;

(D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate;

(E) satisfaction or modification of any lien;

(F) cancellation or modification of any indenture or similar instrument;

(G) curing or waiving of any default;

(H) extension of a maturity date or a change in an interest rate or other term of outstanding securities;

(I) amendment of the debtor's charter; or

(J) issuance of securities of the debtor, or of any entity referred to in subparagraph (B) or (C) of this paragraph, for cash, for property, for existing securities, or in exchange for claims or interests, or for any other appropriate purpose;

11 U.S.C. § 1129(b)(1)

§ 1129. Confirmation of plan

(b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

No. 11-166

In The

Supreme Court of the United States

RADLAX GATEWAY HOTEL, LLC AND
RADLAX GATEWAY DECK, LLC, PETITIONERS

v.

AMALGAMATED BANK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether a Chapter 11 plan that proposes to sell property free of liens, and leave the secured creditor with nothing more than the proceeds of the sale, must permit the secured creditor to credit bid, as required by 11 U.S.C. § 1129(b)(2)(A)(ii).

CORPORATE DISCLOSURE STATEMENT

Respondent Amalgamated Bank has no parent or publicly held company owning 10% or more of its stock.

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STATUTORY PROVISIONS INVOLVED

The relevant portions of the Bankruptcy Code, 11 U.S.C. §§ 363, 506, 1111, and 1129, are set forth in an appendix to this brief. App., *infra*, 1a-22a.

INTRODUCTION

Section 1129(b) of the Bankruptcy Code allows a debtor to cram down a plan over the objection of a class of creditors only if the plan is "fair and equitable" to that class. To be fair and equitable with respect to a class of secured creditors, a cramdown plan must, at a minimum, meet one of three distinct clauses in subparagraph (A) of Section 1129(b)(2). The first two clauses are detailed and specific and govern depending on how the plan proposes to treat the secured creditor's collateral. But each essentially guarantees that the secured creditor either will be paid the full value of its collateral or will take possession of the collateral.

The first clause, clause (i), provides that the secured creditor retains its lien on the property and is paid deferred cash payments up to the allowed amount of the claim its collateral secures. Retention of the lien ensures that if the prescribed payments are not forthcoming, the secured creditor can take its collateral.

The second clause, clause (ii), allows the debtor to sell the collateral free and clear of the secured creditor's liens, with the liens to transfer to the proceeds of the sale—but only if the secured creditor is

provided the right to "credit bid." A credit bid allows the secured creditor to bid for its collateral using the debt it is owed to offset the purchase price. Credit bidding ensures that, if the bidding at the sale is less than the amount of the claim the collateral secures, the secured creditor can, if it chooses, bid up the price to as high as the amount of its claim. That protects the secured creditor against being stripped of its collateral at below its real value. By using its credit to outbid a sale to a third party at a lower price, the secured creditor can choose to take possession of its collateral rather than be left undercompensated by the proceeds from a sale to another.

Here, petitioners propose to do precisely what is contemplated by clause (ii)—to sell respondent's collateral free and clear of its liens and provide respondent nothing more than the proceeds of that sale—but *without* giving respondent the right to protect itself by credit bidding. Petitioners argue that this may satisfy the third clause of Section 1129(b)(2)(A), clause (iii), which requires that the secured creditor be provided the "indubitable equivalent" of its secured claim.

Petitioners' primary defense of this approach is that the "or" before clause (iii) demonstrates that it is one of three permissible alternatives. But the question is not whether "or" means "or." The question is "or *what*?" Whatever clause (iii) may encompass, it cannot be what petitioners propose: an end-run around the more specific, and more stringent, protections of clause (ii).

Congress expressly decided what was required for a cramdown plan to be "fair and equitable" to an objecting class of secured creditors whose collateral was going to be sold free and clear of its liens. Those explicit requirements, including the only limited exception to them, are set forth in clause (ii). As the court of appeals correctly concluded, when Congress provides such a carefully reticulated scheme, the specific provision cannot be evaded through a general provision like clause (iii).

Moreover, no good reason justifies reading clause (iii) to permit the sale of a secured creditor's collateral free and clear of its liens without allowing it to bid its debt in the sale. Credit bidding protects the secured creditor against the well-recognized risk of undervaluation of collateral at sale in bankruptcy. Credit bidding thus preserves the benefit of a secured creditor's pre-bankruptcy bargain: the right to be repaid under certain terms or else to foreclose and take possession of the collateral. The Bankruptcy Code should not be read to upset these expectations.

At the same time, credit bidding does no harm to other creditors, because every penny of a cash bid would have to go into the secured creditor's pocket until that secured creditor has been paid in full. For the very same reason, the only parties who might benefit from preventing credit bidding are not those the bankruptcy laws are designed to protect, and often will include, as here, the preferred bidder of the debtor's insiders. No bankruptcy policy supports benefitting insiders or strangers at the expense of

secured creditors, and there is no reason to read the statute to allow that result.

STATEMENT OF THE CASE

A. Statutory Framework

1. Chapter 11 of the Bankruptcy Code permits a debtor to restructure its obligations and operations in order to preserve value and jobs by enabling it to continue in business itself or to pass its continuing operations to a third-party buyer. This benefits the debtor, its employees, and its creditors.

Several provisions of the Bankruptcy Code permit a Chapter 11 debtor to deal with property that is encumbered by liens in ways that may improve the result of the case. Each of these provisions, however, contains important protections for the lienholder that protect the secured creditor from undervaluation of its collateral. These protections are necessary because of the manner in which Section 506(a) of the Bankruptcy Code treats an undersecured creditor—i.e., a secured creditor for which the value of the collateral securing that creditor's claims is less than the amount owed the creditor.

Section 506(a) bifurcates an undersecured creditor's claim into a secured portion and an unsecured portion. Section 506(a) provides:

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest * * * is a secured claim to the extent of the value of such creditor's interest in the

> estate's interest in such property * * * and is an unsecured claim to the extent that the value of such creditor's interest * * * is less than the amount of such allowed claim.

11 U.S.C. § 506(a)(1). Given this bifurcation, an accurate valuation of the current value of the collateral that secures a claim is essential to protect the legitimate expectations of a secured creditor. Otherwise, undervaluation can lead to the diversion of value from the secured creditor to third parties, including insiders and holders of junior interests, in a manner not justified by any bankruptcy policy.

2. One protection against such undervaluation is found in Section 363. Section 363(b) governs the sale of property of the estate "other than in the ordinary course of business." *Id.* § 363(b)(1). When property that is encumbered by a lien is to be sold under Section 363(b), the lienholder has the right under Section 363(k) to place what is commonly referred to as a "credit bid" for the property. A credit bid allows the secured creditor to bid for the property using the debt it is owed to offset the purchase price. Section 363(k) provides:

> At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such

> property, such holder may offset such claim against the purchase price of such property.

Id. § 363(k). As Section 363(k)'s language makes clear, a secured creditor may credit bid up to the full face amount of its claim—i.e., its "allowed claim"—even if the claim amount exceeds the value of the collateral (that is, even if the secured creditor is undersecured). *Cohen v. KB Mezzanine Fund II, LP (In re SubMicron Sys. Corp.)*, 432 F.3d 448, 459-460 (3d Cir. 2006).

The right to credit bid under Section 363(k) is well-recognized as an important check against the undervaluation of collateral at sale in bankruptcy. *See, e.g.*, 7 Collier on Bankruptcy, ¶ 1129.04[2][b][ii] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2010). If the secured creditor believes that it could generate a greater return on the collateral than that represented by the bidder's offer, then the secured creditor may bid up to the full amount of its claim toward the purchase price. Once it has done so, any higher bid by the secured creditor or any other competing bidder ultimately will result in some cash for other creditors (and perhaps even the debtor).

3. Section 1111(b) also provides a check against undervaluation of a secured creditor's collateral. Section 1111(b)(1)(A) provides that a secured creditor's nonrecourse claims are to be treated as recourse claims. A nonrecourse claim is one where the creditor may look only to the collateral for payment of the claim in case of default; the creditor has no claim for

the deficiency between the value of the collateral and the total amount of the claim. Section 1111(b)(1)(A) provides that a secured claim shall be treated "as if the holder of such claim had recourse against the debtor on account of such claim, whether or not such holder has such recourse." 11 U.S.C. § 1111(b)(1)(A).

Under Section 1111(b)(1)(A)(i) and Section 1111(b)(2), a secured creditor (whether initially recourse or nonrecourse) may elect to forgo its recourse entitlement and instead have its claim treated as fully secured. If a secured creditor makes this election, then "notwithstanding [the bifurcation provision of] section 506(a) of this title, such claim is a secured claim to the extent that such claim is allowed." 11 U.S.C. § 1111(b)(2). The right to make a Section 1111(b) election serves as another important check against the risk of undervaluation of collateral. If a secured creditor believes that its collateral is undervalued, the creditor may opt to have its total debt treated as secured, rather than have the secured portion of its claim limited to the valuation amount of the collateral. *Ibid.*

4. Section 1129 governs the confirmation of Chapter 11 plans. There are two types of confirmation under Section 1129. Subsection (a) addresses consensual plan confirmation, which requires that all classes of creditors either approve the plan or not be impaired by the plan. 11 U.S.C. § 1129(a). Section 1129(a) sets forth 16 separate requirements that must be satisfied for a plan to be confirmed.

Subsection (b) governs non-consensual plan confirmation under Chapter 11—often referred to as cramdown plans. Section 1129(b) incorporates all the requirements of Section 1129(a), other than subsection (a)(8)'s mandate that all classes either accept the plan or be unimpaired. In addition, Section 1129(b) requires, inter alia, that the plan "not discriminate unfairly, and [be] fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." 11 U.S.C. § 1129(b)(1). Each secured claim normally is placed in a class by itself. *Brady v. Andrew* (*In re Commercial W. Fin. Corp.*), 761 F.2d 1329, 1338 (9th Cir. 1985).

For a plan to be "fair and equitable" with respect to a class of secured claims, the plan, at a minimum, must satisfy Section 1129(b)(2)(A). That provision includes three distinct methods—each set forth in a separate clause—by which a plan can satisfy the "fair and equitable" requirement with respect to secured creditors. Section 1129(b)(2)(A) states:

> With respect to a class of secured claims, the plan provides—
>
> > (i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

> (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;
>
> (ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or
>
> (iii) for the realization by such holders of the indubitable equivalent of such claims.

11 U.S.C. § 1129(b)(2)(A).

B. Factual Background

Petitioners RadLAX Gateway Hotel, LLC and RadLAX Gateway Deck, LLC own and operate a Radisson Hotel and an adjacent, incomplete parking structure near the Los Angeles International Airport. Petitioners obtained a $142 million loan in 2007 to purchase the property, renovate the hotel, and build the parking structure. Pet. App. 3a-4a.

Respondent Amalgamated Bank is the trustee of lender Longview Ultra Construction Loan Investment Fund, in its capacity as administrative agent for itself

and co-lender U.S. Bank National Association. Pet. App. 4a, 41a n.2. U.S. Bank National Association is successor-in-interest to the Federal Deposit Insurance Corporation, as receiver for San Diego National Bank. Pet. App. 41a nn.2-3.

To secure the 2007 loan to petitioners, the lenders obtained a blanket lien on all of petitioners' assets. Bankr. Ct. Dkt. 235 at 6.

During construction of the parking facility, petitioners incurred substantial construction overruns. In 2009, petitioners exhausted their committed funding from the secured lenders and were unable to obtain additional funding or restructuring of the loan. Pet. App. 4a.

Petitioners filed for relief under Chapter 11 in August 2009. As of the filing of the bankruptcy petition, petitioners owed more than $120 million on the loans, with over $1 million in interest accruing each month. Pet. App. 4a-5a.

C. Proceedings Below

1. Petitioners' proposed plan

Petitioners submitted for confirmation a reorganization plan in which they proposed to sell at auction substantially all of their assets free and clear of the liens. Pet. App. 5a. Since substantially all of petitioners' assets were encumbered by the secured creditors' liens, petitioners' plan would have removed the secured creditors' security interest in petitioners' assets. Anticipating the objection of the secured

creditors, petitioners sought to obtain confirmation of their plan using the cramdown provisions of Section 1129(b)(2)(A).

Petitioners' plan treats respondent's claim as undersecured and bifurcates it into a secured portion, defined as the "Prepetition Senior Secured Claim," and an unsecured portion, defined as the "Prepetition Senior Deficiency Claim." J.A. 37.[1] Petitioners seek to invoke clause (iii) of Section 1129(b)(2)(A) to cram down a plan over the objection of respondent, an impaired secured creditor that petitioner has placed in a separate class—Class 3. J.A. 48.

Petitioners' proposed plan provides for the sale of encumbered property free and clear of liens and would leave respondent with nothing more (and indeed less) than the proceeds from that sale. J.A. 37-38 ("Prepetition Senior Secured Claim" and "Lender"), 52-53 ("Class 3"), 65-66 (Section 7.01), 69 (Section 7.06); *see* Pet. Br. 4. For the secured portion of respondent's claim, the plan provides that respondent "shall receive, in full satisfaction," of its claim, "the Sale Proceeds in Cash," minus the administrative claim of petitioners' "financial advisor and investment banker," which was retained to act as petitioners'

---

[1] Petitioners later submitted two amended plans, the most recent of which is included in the Joint Appendix at 174. Except where otherwise noted, this brief cites petitioners' original plan, because that is the plan that was submitted in conjunction with petitioners' proposed bid procedures. Petitioners' revised plans are substantially the same as their original plan in all respects relevant here.

broker. J.A. 29, 52. Respondent also would receive the balance of the cash on hand, if any, after payment of tax claims, mechanics' liens, and other priority claims. J.A. 52-53.[2] For the unsecured portion of respondent's claim, the plan provides that respondent will receive 5% of the profits over three years, J.A. 54, to be calculated after deducting a 12% return on the purchaser's investment, J.A. 26-27, 39-40.[3]

Petitioners also submitted proposed bid procedures to govern the sale of their assets at the plan auction. Petitioners proposed to sell their assets to a Stalking Horse bidder subject to a higher bid at auction. Pet. App. 5a-6a. A stalking horse bid is an initial bid on a debtor's assets from an interested buyer chosen by the debtor. *Contrarian Funds LLC v. Aretex LLC* (*In re WestPoint Stevens, Inc.*), 600 F.3d 231, 239 n.3 (2d Cir. 2010).

Harp Group, Inc., an entity owned and controlled by petitioners' principal, Peter G. Dumon, had the right to purchase a minority interest in the Stalking Horse bidder. J.A. 105. If the Stalking Horse bidder were to prevail at the auction, the existing management company would continue managing the hotel.

---

[2] Petitioners' second amended plan provides that certain mechanics' liens also will be deducted from the proceeds of the sale before payment to respondent, rather than deducted from any cash left on hand. J.A. 210.

[3] Petitioners' second amended plan provides that respondent will receive $250,000 over three years "in full satisfaction" of respondent's unsecured claim. J.A. 213-214.

J.A. 105. That management company also is owned and controlled by Dumon. J.A. 105.

The Stalking Horse bid was only $47.5 million, which represented approximately 37% of the value of the secured creditors' prepetition claims against petitioners. Pet. App. 6a. Petitioners' proposal would have precluded the lenders from protecting their interests by credit bidding at the auction. This prohibition on credit bidding was a condition imposed by the Stalking Horse. J.A. 131.

Specifically, petitioners' proposed plan provides that "[t]he Confirmation Order shall grant the relief requested in the Sale and Bid Procedures Motion and authorize a sale of certain or substantially all of the Debtors' assets under sections 365, 1123(b)(4), 1129(b)(2)(A)(iii), 1145 and 1146(a) of the Bankruptcy Code under the terms and conditions of the Asset Purchase Agreement." J.A. 65-66. Petitioners' proposed bid procedures, in turn, provide that the plan sale "is being conducted under sections 1123(a) and (b) and 1129(b)(2)(A)(iii) of the Bankruptcy Code, and not section 363 of the Bankruptcy Code. As such, no holder of a lien on any assets of the Debtors shall be permitted to credit bid pursuant to section 363(k) of the Bankruptcy Code." J.A. 118, 149.

Respondent Amalgamated Bank, as the lenders' administrative agent, objected to petitioners' proposal. Pet. App. 6a.

2. The bankruptcy court's decision

The bankruptcy court rejected petitioners' bid procedures because they did not allow for credit bidding by the secured lenders. The court held that petitioners "may not use [the indubitable equivalence standard of] section 1129(b)(2)(A)(iii) to sell their assets free and clear of liens." Pet. App. 42a. Rather, to auction their assets free and clear, petitioners "must comply with the specific requirements of section 1129(b)(2)(A)(ii)," which provides for credit bidding under Section 363(k). *Ibid.*

After a trial, the court also concluded that there was no "cause" to deny credit bidding under Section 363(k), rejecting, among other theories, petitioners' claims that respondent and the other lender committed some kind of wrongdoing in the administration of the loan. *Id.* at 43a.

Petitioners appealed. The bankruptcy court certified the appeal directly to the Seventh Circuit under 28 U.S.C. § 158(d)(2)(B)(i) and Rule 8001(f)(2)(A)(i) of the Bankruptcy Rules. Pet. App. 30a. The Seventh Circuit authorized the appeal. J.A. 164.

Petitioners later acknowledged that the Stalking Horse bid was worth many millions of dollars *less* than the value of the property, and that petitioners therefore would not attempt to confirm the proposed plan. J.A. 166-167.

3. The Seventh Circuit's decision

The court of appeals unanimously affirmed the bankruptcy court.

The court of appeals first held that the parties continue to have a live dispute. The court based that conclusion on petitioners' filing of an amended asset purchase agreement that "largely resembled" the agreement that was submitted with the original reorganization plans. Pet. App. 8a.[4]

On the merits, the court of appeals rejected petitioners' argument that Section 1129(b)(2)(A)(iii) permits a cramdown plan to auction a secured creditor's collateral free and clear of its liens without credit bidding. Pet. App. 16a-17a. The court concluded that Section 1129(b)(2)(A)(ii) governs all sales of property free and clear of liens and that subsection (iii) "can only be used to confirm plans that propose disposing of assets in ways that can be distinguished from those covered by Subsections (i) and (ii)." Pet. App. 17a.

As the court of appeals explained, under petitioners' proposed interpretation, "plans could qualify for [confirmation] under Subsection (iii) even if they

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[4] In its brief in opposition, respondent suggested that this Court review "[w]hether the court of appeals correctly held, as a predicate question, that it had jurisdiction over this interlocutory appeal despite petitioners' abandonment of the plan ruled on by the bankruptcy court." Br. in Opp. i. The Court did not grant certiorari on that proposed additional question, and respondent therefore no longer presses it.

seek to dispose of encumbered assets in the ways discussed in Subsections (i) and (ii), but fail to meet these Subsections' requirements." Pet. App. 22a. But that "understanding of Section 1129(b)(2)(A)(iii) is unacceptable because it would render the other subsections of the statute superfluous." Pet. App. 23a. It would "place[ ] the two clauses in conflict" and "allow the general to subsume the specific." Pet. App. 23a n.7 (internal quotations omitted).

The court noted that there would be no reason for Congress to "state that a plan must meet certain requirements if it provides for the sale of assets in particular ways and then immediately abandon these requirements in a subsequent subsection." Pet. App. 23a. Thus, the "infinitely more plausible interpretation" is that each clause "stat[es] the requirements for a particular type of sale" and "'conclusively govern[s] the category of proceedings it addresses.'" Pet. App. 23a-24a (brackets omitted) (quoting *Bloate v. United States*, 130 S. Ct. 1345, 1355 (2010)).

The court of appeals further reasoned that petitioners' interpretation "treats secured creditors' interests in a way that sharply conflicts with the way that these interests are treated in other parts of the Code." Pet. App. 24a. "Sections 363(k) and 1129(b)(2)(A)(ii) provide a secured creditor with the right to credit bid whenever a debtor attempts to sell the asset that secures its debt free and clear of its lien." Pet. App. 24a-25a. "By granting secured parties this ability [to credit bid], the Code provides lenders with means to protect themselves from the risk that the winning

auction bid will not capture the asset's actual value." Pet. App. 19a. "If a secured lender feels that the bids that have been submitted in an auction do not accurately reflect the true value of the asset and that a sale at the highest bid price would leave them undercompensated, then they may use their credit to trump the existing bids and take possession of the asset." *Ibid.* Thus, "the Code promises lenders that their liens will not be extinguished for less than face value without their consent." Pet. App. 19a-20a. Accordingly, the court concluded that petitioners' interpretation "would not provide secured creditors with the types of protections that they are generally accorded elsewhere in the Code." Pet. App. 25a.

SUMMARY OF ARGUMENT

Section 1129(b) governs how a Chapter 11 reorganization plan may be confirmed over the objection of impaired creditors. 11 U.S.C. § 1129(b). For a cramdown plan to be confirmed, the plan must "not discriminate unfairly" and must be "fair and equitable" to dissenting classes of creditors. *Id.* § 1129(b)(1). A plan is "fair and equitable" to a secured creditor class only if, at a minimum, it satisfies one of three distinct paths designed to protect secured creditors, as set forth in clauses (i), (ii), or (iii).

A. Petitioners contend that, because the three clauses in Section 1129(b)(2)(A) are alternatives, they can use clause (iii) to cram down a plan that proposes precisely what is specifically covered by clause (ii)—but without providing the protection for secured

creditors required by clause (ii). That approach cannot be squared with the plain language of Section 1129(b)(2)(A), viewed as a whole.

Section 1129(b)(2)(A) establishes a carefully reticulated scheme, where clauses (i) and (ii) set forth specific requirements for cramdown plans, depending on how the plan proposes to treat the secured creditor's collateral. Clause (i) governs where the plan proposes that the liens will remain on the collateral. Clause (ii) governs where the plan proposes to sell the collateral free and clear of the liens. Clause (iii) governs where the plan proposes to treat the collateral in a way distinct from those in clauses (i) and (ii).

In clause (ii), Congress explicitly required that, for a secured creditor's collateral to be sold free and clear of its liens, the plan must provide the secured creditor the right to credit bid. 11 U.S.C. § 1129(b)(2)(A)(ii). Clause (ii) also delimits the sole, limited exception to the right to credit bid—"for cause."

Petitioners cannot evade this detailed and specific scheme by resorting to the general provision of clause (iii). However inclusive clause (iii)'s "indubitable equivalent" language may be, it cannot encompass what petitioners seek to do here: a sale free and clear of liens where the secured creditor is left with nothing more than the proceeds of the sale, but is not allowed to credit bid. To hold otherwise would render the more specific, and more stringent, requirements of clause (ii) essentially meaningless.

For sales free and clear of liens, Congress eschewed the case-by-case valuation approach sought by petitioners. Given the well-recognized risk of undervaluation of collateral, Congress provided secured creditors the right, in all sales free and clear of liens, to protect their security by credit bidding.

B. This conclusion is confirmed by other provisions of the Code. Section 363(k) and Section 1111(b) work in tandem with Section 1129(b)(2)(A) to protect secured creditors against the undervaluation of their collateral.

Section 363(k) provides the right to credit bid whenever, outside the ordinary course of business, property of the bankruptcy estate is sold free and clear of liens. The credit-bidding right protects secured creditors against attempts to sell their collateral for less than it is worth.

Section 1111(b) also protects against undervaluation of collateral. That provision allows a secured creditor to choose to have its entire allowed claim treated as secured, even if the secured creditor is undersecured. If a secured creditor thinks that the collateral is worth more than the actual or expected judicial evaluation, it can elect to have its entire allowed claim treated as secured.

In a cramdown plan, these protections interact with Section 1129(b)(2)(A) to ensure that, in most circumstances, a secured creditor will receive either its full payment or its collateral. Thus, under clause (i),

a secured creditor who makes a Section 1111(b) election will retain its liens to the full value of its allowed claim and be paid deferred cash payments totaling at least the present value of its allowed claim. Likewise, under clause (ii), the right to credit bid up to the full amount of the secured creditor's allowed claim ensures that the creditor either will be paid its full value or take its collateral.

Petitioners' approach should be rejected because it would disrupt these interlocking protections. And none of the provisions cited by petitioners supports allowing them to circumvent the credit-bidding requirement.

C. Allowing debtors to preclude credit bidding when selling property free and clear of liens would serve no bankruptcy purpose. It also would upset the settled expectations of secured creditors. Secured creditors extend loans with the expectation that the collateral will secure their interest: they either will be repaid or will be able to take their collateral. The Code should not be read as upsetting this background principle.

Credit bidding also maximizes value for the bankruptcy estate. Credit bidding increases competition in the sale, making it more likely that the auction will result in a higher bid. The right to cash bid is no substitute: not all secured creditors will be able to make a cash bid, and even those who can will incur transaction costs just to bid on their own collateral. There is no basis to assume Congress would have

intended such a needless cycling of money from the secured creditor, to the estate, and back again to the secured creditor.

Finally, no legitimate bankruptcy interest supports petitioners' approach. Petitioners seek to deny credit bidding so that their chosen Stalking Horse can obtain the property at a lower-than-market price. Allowing them to do so would simply invite manipulation, malfeasance, and favoritism. Petitioners are wrong to assert that their proposal somehow will generate cash to fund other creditors. Even under petitioners' theory, any cash generated by the sale would belong to respondent until its allowed claim is paid in full.

D. The legislative history supports requiring credit bidding when collateral is sold free and clear of liens. Congress viewed the protections of credit bidding under Section 363(k) and making an election under Section 1111(b) as interlocking, with both serving to protect against undervaluation of collateral. Moreover, the examples Congress gave of what would constitute the "indubitable equivalent" in clause (iii) are distinct from situations expressly governed by clauses (i) and (ii).

ARGUMENT

At issue in this case is whether a debtor can, under clause (iii) of Section 1129(b)(2)(A), do precisely what clause (ii) contemplates but *without* providing the secured creditor with the credit-bidding protection that clause (ii) requires. As both the court of

appeals and the bankruptcy court correctly concluded, the answer is no.

A. Section 1129(b) Precludes Confirmation Of A Plan That Proposes To Sell Collateral Free And Clear Of Liens Without Permitting Credit Bidding

When a Chapter 11 cramdown plan proposes to sell a secured creditor's collateral free and clear of its liens, the plain language of Section 1129(b)(2)(A) requires that the plan provide the secured creditor the right to credit bid.

1. The plain language of Section 1129(b)(2)(A) requires credit bidding when property is sold free and clear of liens

Petitioners' primary argument in support of their reading of Section 1129(b)(2)(A) is that clauses (i), (ii), and (iii) are connected by the disjunctive word "or." Pet. Br. 17. But "or" just means that the debtor need not satisfy all three clauses. 11 U.S.C. § 102(5). It does not define the scope of each clause. It also does not mean that clause (iii) may be used to cram down a plan that sells a secured creditor's collateral free and clear of its liens without allowing it to credit bid.

When Section 1129(b)(2)(A) is construed as a whole, as it must be, the plain language makes clear that the three paths govern distinct situations. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) ("a reviewing court should not confine itself to examining a particular statutory provision in isolation"). Which path governs depends on the

proposed treatment of secured creditors' claims under the plan. When, as here, the plan contemplates the sale of property free and clear of a secured creditor's liens, clause (ii) governs and the creditor must be given the right to credit bid.

a. *Clause (i).* By its terms, clause (i) governs where the plan contemplates that the secured creditor will "retain the liens securing such claims." 11 U.S.C. § 1129(b)(2)(A)(i)(I). Under clause (i), Congress essentially permits the debtor to rewrite its loan for property already secured by liens. 7 Collier, *supra*, ¶ 1129.04[2][a].[5] The secured creditor is protected in clause (i) because, regardless of whether its collateral "is retained by the debtor or transferred to another entity," its liens remain on the property. 11 U.S.C. § 1129(b)(2)(A)(i)(I).

Clause (i) also guarantees the secured creditor the payment of the present value of its secured claim—i.e., "deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property." 11 U.S.C. § 1129(b)(2)(A)(i)(II).

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[5] The debtor may or may not be the plan proponent. Chapter 11 provides the debtor a 120-day period of exclusivity to file a reorganization plan. 11 U.S.C. § 1121(c)(2). In this case, petitioners are the plan proponents.

As discussed below (*see* pp. 39-41 *infra*), a secured creditor can make an election under Section 1111(b) so that its "claim is a secured claim to the extent that such claim is allowed." 11 U.S.C. § 1111(b)(2). If the secured creditor makes such an election, the total deferred payments it receives under Section 1129(b)(2)(A)(i) must equal (or exceed) the creditor's full claim against the debtor—i.e., "the allowed amount of such claim[]." 11 U.S.C. §§ 1111(b)(2), 1129(b)(2)(A)(i)(I).

Clause (ii). In contrast, clause (ii), by its terms, governs when the plan contemplates the sale of "property that is subject to the liens securing such claims, free and clear of such liens." 11 U.S.C. § 1129(b)(2)(A)(ii). In exchange for its secured claim, the secured creditor's liens "attach to the proceeds of such sale." *Ibid.* The resulting lien on the proceeds must then be treated "under clause (i) or (iii) of this subparagraph." *Ibid.*

Although the secured creditor thus may lose its interest in the property originally securing its claim, it still has the opportunity to rely on its collateral to protect itself. Clause (ii) expressly requires that any such sale be "subject to section 363(k)." *Ibid.* Section 363(k) requires credit bidding—"unless the court for cause orders otherwise the holder of such claim may bid at such sale and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property." 11 U.S.C. § 363(k).

The statutory requirement that the sale be "subject to section 363(k)" provides an important protection against the undervaluation of collateral at sale in bankruptcy. *See, e.g.*, 7 Collier, *supra*, ¶ 1129.04[2][b][ii]. A number of factors may cause a price obtained at the auction of collateral to be undervalued. Pet. App. 20a n.6. For example, quick timing and insufficient notice or marketing may result in potentially interested purchasers being unaware of the sale. Additionally, there is reason to suspect that, by its very nature, *any* bankruptcy sale of property will not produce true market value. Pet. App. 18a-20a.

Finally, the debtor's existing management or ownership may stand to benefit if the assets are sold at a discount to an insider (or a buyer that includes an insider) who will preserve the existing business. This can lead to insider manipulation of the marketing and sale process, often quite subtle and difficult to detect, to achieve that goal. *Gandal v. Telemundo Grp., Inc.*, 997 F.2d 1561, 1562 (D.C. Cir. 1993); *Dynamic Corp. of Am. v. CTS Corp.*, 805 F.2d 705, 711 (7th Cir. 1986); Pet. App. 20a n.6.

Thus, as the court of appeals recognized, the right to credit bid provides secured "lenders with the means to protect themselves from the risk that the winning auction's bid will not capture the asset's actual value." Pet. App. 19a; 7 Collier, *supra*, ¶ 1129.04[2][b][ii]. Because the secured creditor will lose its lien and be entitled only to the "proceeds of such sale," the right to credit bid ensures that if a secured creditor is not going to be repaid in full, it

"may use [its] credit to trump the existing bids and take possession of the asset." Pet. App. 19a.

Clause (iii). Lastly, by its terms, clause (iii) provides a third, catchall path for plans. That clause provides that a cramdown plan may be fair and equitable if it provides "for the realization by such holders of the indubitable equivalent of such claims." 11 U.S.C. § 1129(b)(2)(A)(iii). While the language of clause (iii) is general, its scope is narrow. For something to meet the "indubitable equivalent" standard, it must be beyond any doubt that the creditor will receive the full value of the secured claim. *See* 7 Collier, *supra*, ¶ 1129.04[2][c].

The classic example under clause (iii) is the surrender of some or all of the property to the creditor (often called a "dirt-for-debt" plan). If the secured creditor receives all the collateral itself, there is no question that the creditor receives the true value of the collateral. *Arnold & Baker Farms v. United States* (*In re Arnold & Baker Farms*), 85 F.3d 1415, 1423 (9th Cir. 1996). The standard also may be satisfied by providing suitable substitute collateral (also known as a replacement lien) if "the creditor receives 'substitute of the most indubitable equivalence' providing for present value and safety of principal." *Ibid.* 7 Collier, *supra*, ¶ 1129.04[2][c].[6]

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[6] Plans providing for substitute collateral are disfavored and viewed with skepticism. Rightly so: "The debtor's only motive for substitution of collateral" is that "the substitute

(Continued on following page)

Nothing in the text of clause (iii) permits the debtor to provide *less* protection to a secured creditor than is required by clauses (i) or (ii).

b. Yet here, petitioners attempt to rely on the general language of clause (iii) to do precisely what is specifically governed by clause (ii): namely, to sell the secured creditors' collateral free and clear of their liens and pay them nothing more (and indeed less) than the proceeds from that sale. J.A. 52-53, 65-66, 68; *see* Pet. Br. 4. But petitioners propose to do so without affording the essential protection against undervaluation required by clause (ii): the right to credit bid at the sale. J.A. 118, 149. Petitioners also failed to prove "cause," Pet. App. 43a-44a, the only exception to the right to credit bid.

As the Seventh Circuit correctly held, clause (iii) does not permit such an end-run around the "detailed and carefully tailored language" of clause (ii). Pet. App. 12a, 23a. Rather, viewing Section 1129(b)(2)(A) as a whole, clause (iii) governs cramdown plans that "propose[] disposing of assets in ways that are not described in Subsections (i) and (ii)." Pet. App. 24a.

This Court repeatedly has held that "'[a] specific provision' * * * 'controls one[s] of more general application.'" *Bloate*, 130 S. Ct. at 1354 (quoting *Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991))

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collateral is likely to be worth less than the existing collateral." *In re River E. Plaza, LLC*, ___ F.3d ___, 2012 WL 169760, at *5 (7th Cir. Jan. 19, 2012).

(brackets in original). In *Bloate*, the Court held that where Congress has provided a list of specific subparagraphs addressing particular circumstances, those options should "govern, conclusively unless the subparagraph itself indicates otherwise." *Id.* at 1355.

Thus, where Congress has turned its attention to a specific situation, and provided a carefully drawn provision to address it, a party cannot evade that better-fitted provision by resorting to a more general one, especially one with fewer restrictions. *See, e.g.*, *Hinck v. United States*, 550 U.S. 501, 506 (2007) (quoting *EC Term of Years Trust v. United States*, 550 U.S. 429, 433 (2007)). This is true "[h]owever inclusive may be the general language of a statute." *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957). The general provision "'will not be held to apply to a matter specifically dealt with in another part of the same enactment.'" *Ibid.* (quoting *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932)).

Here, clause (ii) explicitly addresses cramdown plans that contemplate a sale of the secured creditor's collateral free and clear of its liens that would leave the creditor with nothing more than the proceeds from that sale. 11 U.S.C. § 1129(b)(2)(A)(ii). Clause (ii) provides that such a plan can be "fair and equitable" only if it allows the secured creditor the right to credit bid. *Ibid.* Thus, "however inclusive" the general language of clause (iii)'s indubitable equivalent requirement may be, it cannot be read to permit a sale free and clear of the secured creditor's liens

without allowing credit bidding. *Fourco Glass Co.*, 353 U.S. at 228.

This conclusion is confirmed by the fact that clause (ii) expressly provides a role for clause (iii)'s indubitable equivalence requirement when a debtor sells property free and clear of liens. Specifically, clause (ii) provides that the secured creditor's liens will attach to the proceeds of the sale, with "the treatment of such liens on proceeds under clause (i) or (iii)." 11 U.S.C. § 1129(b)(2)(A)(ii). Thus, by the terms of clause (ii), clause (iii) comes into play in a sale free and clear of liens only *after* there has been a sale at which the secured creditor has had the right to credit bid.

Petitioners cannot skip this critical step and go straight to clause (iii)'s assessment of indubitable equivalence. Petitioners' interpretation would "allow[] the debtor to decide unilaterally to deny credit bidding, with only a belated court inquiry at confirmation to determine whether the denial of credit bidding was 'fair and equitable' to the secured lenders." *In re Philadelphia Newspapers, LLC*, 599 F.3d 298, 333 n.18 (3d Cir. 2010) (Ambro, J., dissenting). Congress rejected that approach. Instead, it required credit bidding as a "crucial check" against the "substantial risk that assets sold in bankruptcy auctions will be undervalued." Pet. App. 20a-21a.

Moreover, Congress expressly addressed the circumstance in which an objecting secured creditor's

collateral could be sold free and clear of liens without credit bidding. It determined that the right to credit bid should be afforded "unless the court for cause orders otherwise." 11 U.S.C. § 363(k). This is a narrow exception, as petitioners acknowledge, which they tried and failed to satisfy. Pet. Br. 35 (noting that the "cause exception in § 363(k) * * * is generally reserved for creditor malfeasance or priority disputes among lien holders"); Pet. App. 43a-44a. Given that Congress expressly delimited in clause (ii) when credit bidding can be denied, clause (iii) should not be read to create sub silentio a much broader exception.

Furthermore, as the Seventh Circuit concluded, petitioners' interpretation of clause (iii) "would render the other subsections of the statute superfluous." Pet. App. 23a. Reading clause (iii) to permit a sale of collateral free and clear of liens, without complying with clause (ii)'s express credit bidding requirement, would rob clause (ii) of its essential meaning. *Bloate*, 130 S. Ct. at 1354. It would have made little sense for Congress to have imposed such a specific requirement in one provision, only to have permitted evasion of that very same requirement in another. *Ibid.*

2. *Petitioners' "plain language" arguments are unavailing*

a. Petitioners' reliance on "includes" and "provides" (Pet. Br. 17-18) is as misplaced as their reliance on "or." *See* p. 22, *supra*.

The term "includes" is in the opening clause of Section 1129(b)(2) as a whole, not the opening clause

of subparagraph (A) dealing with secured creditors. *See* 11 U.S.C. § 1129(b)(2) ("the condition that a plan be fair and equitable with respect to a class *includes* the following requirements" (emphasis added)). This "includes" simply means that Section 1129(b)(2) sets forth the *minimum* "requirements" that a plan must meet in order to be considered "fair and equitable" to secured creditors (in paragraph (A)), unsecured creditors (in paragraph (B)), and interests (in paragraph (C)). *Federal Sav. & Loan Ins. Corp. v. D & F Constr. Inc. (In re D & F Constr. Inc.)*, 865 F.2d 673, 675 (5th Cir. 1989); 7 Collier, *supra*, ¶ 1129.04[1]; 11 U.S.C. § 102(3) ("'includes' and 'including' are not limiting").

Even if "includes" were somehow read to make the three clauses in subparagraph (A) merely illustrative, that would not provide petitioners with "flexibility" (Pet. Br. 18) to evade the carefully drawn provisions of clause (ii). Sales of property free and clear of liens still would be governed by clause (ii)'s specific provisions. As this Court has explained, the fact that a list of provisions "is illustrative rather than exhaustive in no way undermines [the] conclusion" that a situation falling within one of the provisions "is governed by the limits in that [provision]." *Bloate*, 130 S. Ct. at 1354.

Moreover, the relevant opening clause is that of subparagraph (A). This opening clause states that for a plan to be "fair and equitable" "[w]ith respect to a class of secured claims," the plan must "*provide*[ ]" at least one of three alternatives to the class of secured

claims. 11 U.S.C. § 1129(b)(2)(A) (emphasis added). This language makes clauses (i), (ii), and (iii) not merely illustrative.

Contrary to petitioners' contention (Pet. Br. 17), nothing about the term "provides" in subparagraph (A)'s opening clause supports their interpretation. To be sure, when the plan proponent is the debtor, it can "select[ ] which of the three alternatives to pursue." Pet. Br. 17. But that says nothing about the scope of each alternative. It does not mean that a plan proponent can propose a sale free and clear of liens without satisfying the requirements of clause (ii).

b. Petitioners' attempts to avoid well-established canons of construction fare no better.

Petitioners contend that clauses (i) and (ii) provide procedural protections while clause (iii) imposes a different, more exacting substantive protection. Pet. Br. 29-31. According to petitioners, this means "neither subsection is more specific or more general than the other." Pet. Br. 30. They further assert that this means that their interpretation does not render clause (ii) superfluous. Pet. Br. 32.

As an initial matter, petitioners' substantive-versus-procedural argument ignores that the inquiry in each of the three clauses is aimed at determining what is "fair and equitable." 11 U.S.C. §§ 1129(b)(1), (2). *That*, not the "indubitable equivalent" requirement, is the substantive requirement that all cramdown plans must satisfy. *Ibid.* Each of the three clauses is designed to ensure, depending on the

proposed treatment of secured creditors' claims, that a secured creditor either receives full payment for its secured claims or can take the collateral that secures those claims. At bottom, what petitioners seek to do is substitute their preferred procedure—post hoc judicial valuation—for the credit-bidding procedure required by Congress.

In any event, petitioners fail to explain why their supposed substantive-versus-procedural distinction would mean that the credit-bidding requirement of clause (ii) could be evaded by resort to clause (iii). Regardless of whether credit bidding is characterized as procedural or substantive, Congress expressly determined that the right to credit bid is necessary, at a minimum, to render "fair and equitable" a plan that proposes to sell the secured creditor's collateral free and clear of its liens. Where, as here, two provisions (clauses (ii) and (iii)) could be capable of governing that type of sale, the more specific provision controls. *See, e.g.*, *Bloate*, 130 S. Ct. at 1354.

Petitioners attempt to distinguish *Bloate*, contending that, in that case, the "'specific governs the general' canon applied because the limiting subparagraph (D) was a subset of the more general § 3161(h)(1)." Pet. Br. 31. But the specific provision need not be a "subset" of the general for the specific provision to control. Indeed, the provisions do not even need to be in the same statute. *Fourco Glass*, 353 U.S. at 228-229 ("specific terms prevail over the general *in the same or another statute* which otherwise might be controlling" (emphasis added)); *see also*

Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384-385 (1992); *HCSC-Laundry v. United States*, 450 U.S. 1, 6, 8 (1981). The important point is that, when Congress has enacted a provision with requirements carefully drawn to address a particular situation, that provision cannot be evaded by resort to a more general—particularly a more generous—provision. *See, e.g., Hinck*, 550 U.S. at 506.

Petitioners' reading would render this carefully tailored scheme superfluous. On that point, their only response is that, even if clause (iii) allows sales free and clear of liens, a debtor still might "opt to pursue confirmation under subsection (ii) and simply permit the creditor to credit bid at the sale." Pet. Br. 32. That misses the point. Under their interpretation, "[t]he Bankruptcy Code would not need the 'intricate phraseology,' of the three clauses under § 1129(b)(2)(A)," because the debtor could simply proceed under clause (iii) with a sale that allows credit bidding. *Philadelphia Newspapers*, 599 F.3d at 330 (Ambro, J., dissenting) (quoting *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 373 (1988)).

c. Nor is there merit in petitioners' suggestion that the court of appeals erroneously conflated the approval of bid procedures with plan confirmation.

Petitioners claim that "[a]pproval of auction bid procedures and confirmation of a plan are two separate and distinct parts of the chapter 11 process" and that "[t]he only question currently before the Court is

whether the Debtors may proceed with the auction using bid procedures that preclude credit bidding." Pet. Br. 40.

That is not so. The question that petitioners presented to this Court is "[w]hether a debtor may pursue a chapter 11 *plan* that proposes to sell assets free of liens without allowing the secured creditor to credit bid * * *." Pet. i (emphasis added).[7] Petitioners' proposed bid motion and plan are expressly interrelated. J.A. 65-66, 109, 223. They contemplate a cramdown plan that will provide for the sale of collateral free and clear of liens and leave the secured creditors with nothing more (and indeed less) than the proceeds of that sale. J.A. 52-53, 65-66, 68; *see* Pet. Br. 4. This is the precise situation specifically addressed by clause (ii), and it requires credit bidding.[8]

Regardless of whether an auction without credit bidding *could* result in an amount of proceeds that is

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[7] If petitioners are correct that the plan is not "before the Court" (Pet. Br. 40), the Court should dismiss the petition as improvidently granted.

[8] Moreover, if petitioners' proposed sale is somehow separate from the plan, and thus not a plan sale, the only other provision of the Bankruptcy Code that would allow such a sale would be Section 363(b). 11 U.S.C. § 363(b). That provision governs during the course of a bankruptcy proceeding outside the ordinary course of the debtor's business, including when the sales are free and clear of liens under 11 U.S.C. § 363(f). *Ibid.* By its terms, Section 363(k)'s credit-bidding requirement applies to "a sale under subsection (b) of this section." 11 U.S.C. § 363(k).

as much as would result if the secured creditors were allowed to credit bid (*see* Pet. Br. 40-41), that is not a basis to preclude credit bidding. If the auction produces bids sufficient to satisfy the secured creditor, it need not exercise its right to bid.

More importantly, Congress already specifically addressed this situation and eschewed petitioners' case-by-case approach. Recognizing the risk of undervaluation of the present value of the collateral in a sale free and clear of liens, Congress required credit bidding in all such sales to ensure that secured creditors' liens would "not be extinguished for less than face value without their consent." Pet. App. 19a-20a.[9]

B. Depriving A Secured Creditor Of Its Right To Credit Bid Cannot Be Reconciled With The Structure Of Chapter 11

The conclusion that Section 1129(b)(2)(A) requires the right to credit bid when collateral is sold free and clear of an impaired creditor's liens is confirmed by the structure of the Bankruptcy Code. As

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[9] Although not at issue in this case, this protection would be just as necessary if a plan proposed to sell collateral free and clear of liens and provide the secured creditor the proceeds of that sale supplemented by some other form of compensation. *See* Pet. Br. 45. In that situation, the risk that the proceeds portion of the compensation would be undervalued would be no different than where, as here, the plan proposed to give nothing more than the proceeds. Moreover, allowing such a proceeds-plus-compensation plan under clause (iii) would invite evasion of clause (ii)'s carefully drawn requirements.

this Court repeatedly has held, particularly in the context of the Bankruptcy Code, "[s]tatutory construction * * * is a holistic endeavor." *United Sav. Ass'n*, 484 U.S. at 371. A provision is "often clarified by the remainder of the statutory scheme * * * because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Ibid.* Here, the court of appeals correctly rejected petitioners' interpretation because it would "treat[ ] secured creditors' interests in a way that sharply conflicts with the way that these interests are treated in other parts of the Code." Pet. App. 24a. In particular, it "would make an anomalous distinction between those sales free of liens conducted prior to plan confirmation under § 363 and those sales free of liens conducted as part of a cramdown plan under § 1129(b)(2)(A)." *Philadelphia Newspapers*, 599 F.3d at 333 (Ambro, J., dissenting).

1. Other interlocking Code provisions confirm that credit bidding is required

Three provisions of the Bankruptcy Code work together to protect secured creditors against undervaluation of their collateral: Section 363(k), Section 1111(b), and Section 1129(b)(2)(A)(ii). Section 1129(b) was enacted in conjunction with Section 1111(b), and the two cannot be viewed in isolation. 124 Cong. Rec. 32,406 (1978) (statement of Rep. Don Edwards)

("Before discussing section 1129(b) an understanding of section 1111(b) is necessary.").[10]

a. Section 363(k) prevents the undervaluation of property secured by a creditor's liens by permitting credit bidding.

During the course of a bankruptcy proceeding, Section 363 allows for the sale, outside the ordinary course of the debtor's business, of property free and clear of liens under certain conditions. 11 U.S.C. § 363(b), (f). One such condition is that the secured creditor that holds the lien on the property has the right to credit bid up to the full amount of its claim toward the purchase of the property. 11 U.S.C. § 363(k). Section 363(k) provides:

> At a sale * * * of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

11 U.S.C. § 363(k).

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[10] "Because of the absence of a conference and the key role[ ] played by Representative Edwards," this Court has treated his "floor statements on the Bankruptcy Reform Act of 1978 as persuasive evidence of congressional intent." *Begier v. IRS*, 496 U.S. 53, 64 n.5 (1990).

As the court of appeals recognized, the right to credit bid under Section 363(k) "provides lenders with means to protect themselves from the risk that the winning auction bid will not capture the asset's actual value." Pet. App. 19a. An accurate valuation of the current value is important to secured creditors because "any amount bid * * * up to the value of Lender's full claim becomes the secured portion of Lender's claim by definition." *Cohen*, 432 F.3d at 460. Section 363(k) thus "gives the secured creditor protections against attempts to sell the collateral too cheaply; if the secured party thinks the collateral is worth more than the debtor is selling it for, it may effectively bid its debt and take title to the property." 7 Collier, *supra*, ¶ 1129.04[2][b][ii].

Conversely, a lender need not use its credit to outbid other bidders unless the lender believes it could generate a greater return on the property than the return represented by the highest bidder's offer. *Ibid.* To the extent that a secured creditor credit bids the full value of its claim and loses at auction to a higher bid, that creditor was not undersecured because the value of the collateral was more than the total claim.

b. Section 1111(b) likewise protects secured creditors from undervaluation of their collateral.

This provision works in tandem with Section 506(a), which bifurcates an undersecured creditor's claim into a secured claim to the amount of the collateral and an unsecured claim for the deficiency.

11 U.S.C. § 506(a)(1).[11] In other words, if the creditor is owed $75 secured by a lien on property worth $50, that creditor has a secured claim for $50 and an unsecured claim for $25. Under Section 1111(b)(2), however, a class of secured creditors may elect instead to have their claims treated as fully secured, notwithstanding the fact that the collateral may be valued at less than the total claim. 11 U.S.C. § 1111(b)(2).

If a class of secured creditors makes this Section 1111(b)(2) election, then "such claim is a secured claim to the extent that such claim is allowed." *Id.* § 1111(b)(2). If a Section 1111(b)(2) election is made, the debtor may retain the collateral only by paying the creditor the full amount of its claim.

The right to make a Section 1111(b)(2) election serves as a check against undervaluation of collateral and preserves the secured creditor's benefit of its original bargain. If the creditor believes that the collateral is worth more than the bankruptcy court's actual or expected valuation, the creditor can keep its whole lien and forfeit its right to an unsecured claim for the difference between the total claim and the court's valuation of the collateral. Section 1111(b) thus "protects the legitimate expectation of secured lenders that the bankruptcy laws will be used only as

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[11] Under Section 1111(b)(1)(A), a secured creditor will be treated as a "recourse" lienholder, regardless of whether the creditor actually has recourse. *See* pp. 6-7, *supra*.

a shield to protect debtors and not as a sword to enrich debtors at the expense of secured creditors." 7 Collier, *supra*, ¶ 1111.03.

c. In a Section 1129(b)(2) cramdown plan, the interaction between Sections 363(k) and 1111(b) ensures that, in most circumstances, a secured creditor either will receive payment for its full claim or will be able to take possession of its collateral.

Clause (i). When a cramdown plan contemplates that the debtor's property will remain subject to liens, the secured creditor has the right to elect under Section 1111(b)(2) that its entire allowed claim be treated as a secured claim. *See* 11 U.S.C. §1129(b)(2)(A)(i). If the creditor so elects, it will retain liens on the entire allowed amount of its claim. In other words, if a secured creditor has a claim for $10 million secured by liens on property now worth $8.5 million, the creditor will retain liens with a face value of $10 million on the property. 11 U.S.C. § 1129(b)(2)(A)(i)(I) (creditor "retain[s] the liens securing such claims * * * to the extent of the allowed amount of such claims").

Moreover, the Code requires that the secured creditor receive "deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property." 11 U.S.C. § 1129(b)(2)(A)(i)(II). This means that the creditor must receive the present value of the collateral (i.e., "of a value, as of the

effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property"). And the "deferred cash payments" must total "at least the allowed amount of such claim"—which if there has been a Section 1111(b)(2) election is the face value of the total allowed claim.

Thus, in the example above, if the creditor has made a Section 1111(b)(2) election, a Section 1129(b)(2)(A)(i) cramdown plan under which the debtor retains the collateral must provide the following: "The amount of principal payments to the secured creditor must equal $10 million, as that is its 'allowed secured claim.' But the plan proponent need only give the creditor a note that has a present value of $8.5 million." 7 Collier, *supra*, ¶ 1111.03[6][B] (footnote omitted). Thus, the Section 1111(b)(2) election ensures that "the debtor is not taking advantage of inaccurate nonmarket valuation," *ibid.*, or seeking merely to rewrite a loan on more favorable terms.

Indeed, the very purpose of applying Section 1111(b) to this type of circumstance is to preclude debtors from misusing the Bankruptcy Code to rid themselves of liens and repay secured loans at a discount based on an inaccurate valuation of the collateral. It also serves to protect against "the harsh result of" *In re Pine Gate Assocs.*, 2 Bankr. Ct. Dec. 1478 (Bankr. N.D. Ga. 1976), under which "a debtor could file bankruptcy proceedings during a period when real property values were depressed, propose to repay secured [nonrecourse] lenders only to the extent of the then-appraised value of the property, and

'cram down' the secured lender class, preserving any future appreciation of the property for the debtor." *Tampa Bay Assocs. v. DRW Worthington, Ltd. (In re Tampa Bay Assocs.)*, 864 F.2d 47, 49-50 (5th Cir. 1989).

Clause (ii). In contrast, if the debtor's property is to be sold free and clear of liens, the Section 1111(b) election is not an option. *See* 11 U.S.C. § 1111(b)(1)(B)(ii) (election may not be made if "such property is sold under section 363 of this title or is to be sold under the plan"). But in that circumstance, clause (ii) of Section 1129(b)(2)(A) protects the secured creditor against the risk of undervaluation. Similar to the Section 1111(b) election, clause (ii) provides the right to credit bid the full amount of the allowed claim (not merely the amount of the allowed secured claim).

As one of the principal drafters of the Bankruptcy Code has explained: secured creditors are "ineligible to make the [Section 1111(b)] election if the holders have recourse against the debtor and the collateral is sold. The recourse creditor will be able to bid in its claim when the collateral is sold and may have an unsecured claim for any deficiency." Kenneth N. Klee, *All You Ever Wanted to Know About Cram Down Under the New Bankruptcy Code*, 53 Am. Bankr. L.J. 133, 153 (1979); *see also* 7 Collier, *supra*, ¶ 1129.04[2][b][ii] ("If a sale is contemplated, that sale will preclude a secured creditor from making an election under section 1111(b) so long as the secured creditor's rights to credit bid the entire amount of its

debt is preserved."). The Section 1111(b)(2) election and the right to credit bid in Section 1129(b)(2)(A)(ii) are thus "opposite sides of the same coin," *Philadelphia Newspapers*, 599 F.3d at 334 (Ambro, J., dissenting)—by linking the secured creditor's rights to the full amount of its claim, they give the secured creditor the right to forgo all or part of the unsecured portion of its claim to ensure that the current value of its secured portion is not undervalued.

Petitioners' interpretation of Section 1129(b)(2)(A) therefore should be rejected because it would disrupt these careful protections created by Congress. There is no reason to believe that Congress created this elaborate scheme to protect secured lenders against the undervaluation of their collateral just to have it undone through clause (iii).

2. The other provisions in the Code on which petitioners rely do not support their reading of Section 1129(b)(2)(A)

a. In an attempt to respond to the elaborate, interlocking protections afforded by Sections 1111(b)(2) and 363(k), petitioners claim that there are "numerous situations where the Code provides *neither* protection." Pet. Br. 34. But nothing petitioners cite supports their attempt to circumvent the credit-bidding requirement in Section 1129(b)(2)(A)(ii).

First, petitioners point to the "cause" exception to credit bidding in Section 363(k). Pet. Br. 35. As discussed above, *see* pp. 29-30 *supra*, that express, limited exception counsels against reading the general

language of clause (iii) of Section 1129(b)(2)(A) to be an unstated, much broader exception. Moreover, that the Code strictly limits the circumstances where credit bidding can be denied (such as for malfeasance) confirms the importance of that right to secured creditors.

Second, petitioners point to 11 U.S.C. § 1111(b)(1)(B)(ii) to claim that, "if a debtor transfers collateral subject to a lien to a third party under § 1129(b)(2)(A)(i), the secured creditor is not entitled to make the § 1111(b) election because the collateral is sold." Pet. Br. 34. Laying aside that "transfers" under clause (i) of Section 1129(b)(2)(A) may not be "sales," it is far from clear that the plan petitioners hypothesize would be deemed "fair and equitable."

In any event, as a practical matter, any such sale under clause (i) is unlikely to occur when the secured creditor is undersecured. This is so because, under clause (i), the creditor would retain the lien, and the collateral would be sold subject to the liens. 11 U.S.C. § 1129(b)(2)(A)(i). For example, if a secured creditor were undersecured in a property currently worth $1 million, a buyer would be unlikely to pay anything at all (let alone anything close to $1 million) for a property that would remain subject to $1 million in liens, because the buyer would get no equity for his money. *See* 7 Collier, *supra*, ¶ 1129.04[b][iv] (a sale subject to liens "will reduce the price an intelligent buyer will pay for the collateral"). Even if such a sale were to occur, it would not present the same risk as petitioners' plan because the secured creditors would

retain their lien and hence would retain the benefit of their security.

Third, petitioners' final two examples likewise do not support their position. Pet. Br. 35. They note that a creditor cannot make an election under Section 1111(b) when its interest in the collateral is inconsequential or of no value. Petitioners further observe that the Code expressly allows a debtor to modify a lien to implement its plan. *Ibid.* (citing 11 U.S.C. § 1123(a)(5)(E)). Petitioners argue that these provisions support their reading of clause (iii) because they purportedly allow the debtor to take actions to inure to itself the "upside" potential of the collateral. Pet. Br. 35-36.

Even assuming that is so, that misses the point here. Petitioners are simply wrong in asserting that credit bidding is just about seeking "the upside potential of * * * collateral." Pet. Br. 28; *see* Pet. Br. 33. Credit bidding, as Congress recognized in Section 1129(b)(2)(A)(ii) and Section 363(k), is essential to an accurate determination of the *present* value of the collateral. It protects the secured creditor when "the bids that have been submitted in an auction do not accurately reflect the true value of the asset." Pet. App. 19a.

b. Petitioners also point to Section 1123(a)(5)(D), contending that it permits the sale of property "free of any lien," without mandating credit bidding. Pet. Br. 21. But that provision creates no substantive right to sell property free and clear of liens, let alone a

substantive right to do so without permitting credit bidding. Rather, Section 1123(a)—entitled "Contents of plan"—merely sets forth a *list* of the general kinds of provisions that a plan may include to meet the mandate that the plan provide "adequate means for its implementation." 11 U.S.C. § 1123(a).

Section 1123(a) thus does not purport to set forth substantive requirements for the various components that must be included in the plan. Other provisions, such as Section 1129, provide those substantive requirements. *See, e.g.*, 11 U.S.C. § 1129(a) ("The court shall confirm a plan only if all of the following requirements are met * * * ."). In the cramdown context, clause (i) of Section 1129(b)(2)(A) addresses plans that provide that lienholders "retain the liens securing such claims," and clause (ii) addresses plans that provide "for the sale * * * of any property * * * free and clear of such liens."

Petitioners' reliance on Section 363(*l*) is therefore misplaced. Petitioners point to that provision for the proposition that Congress knows how to require credit bidding under a Chapter 11 plan if it wants to. Pet. Br. 21. But that ignores that Congress *did* expressly require credit bidding in the very type of cramdown plan that petitioners propose: Section 1129(b)(2)(A)(ii) explicitly incorporates the credit-bidding requirements of Section 363(k).

c. Petitioners further assert that Section 1129(b)(2)(A)(iii)'s "indubitable equivalent" requirement is not limited by clause (ii)'s credit bidding

requirement because Congress expressly provided limitations in Section 361, a different indubitable equivalent requirement. Pet. Br. 19, 43.

Section 361 provides that "adequate protection" may be provided by "granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property." 11 U.S.C. § 361(3). Pointing to that provision's "such other relief" and "other than" limitations, petitioners contend that the absence of a similar limitation in Section 1129(b)(2)(A)(iii) demonstrates that Congress intended for clause (iii) to encompass the precise circumstances addressed by clause (ii).

That is not so. Even if "other" appeared in Section 1129(b)(2)(A)(iii), petitioners likely would be advancing the same argument they make here, i.e., that they are doing something "other" than clause (ii). In any event, as explained above, interpretive canons of construction foreclose their resort to the more general provision of clause (iii) in the face of Congress's carefully drawn scheme for sales free and clear in clause (ii). *See* pp. 27-30 *supra*.

d. Petitioners suggest that Section 506(a), by bifurcating an undersecured creditor's allowed claim into a secured claim and an unsecured claim, eliminates the need for credit bidding. Pet. Br. 24-25, 27. Petitioners state that the Code establishes adequate procedures to ensure that the present value of a

secured creditor's collateral is protected during the pendency of bankruptcy (Pet Br. 24) and then is realized by the secured creditor at plan confirmation (Pet. Br. 25-27).

But as petitioners acknowledge, that ultimate realization by the secured creditor will depend upon accurately setting "the present value of its collateral when the plan is confirmed." Pet. Br. 25. As petitioners also acknowledge (Pet. Br. 26-27), that is the purpose of Section 1129(b)(2)(A). So this argument merely begs the question presented.

Likewise, petitioners' assertions (Pet. Br. 27-28) that, once bifurcated, a secured creditor's unsecured deficiency claim will be adequately protected says nothing about the correct interpretation of Section 1129(b)(2)(A). The important point for present purposes is to ensure that the secured portion of the secured creditor's claim is accurately valued at confirmation, so that the deficiency claim will be no larger than it should be. Otherwise, value will be wrongly diverted from the secured creditor to third parties, including junior interests.

C. No Purpose Would Be Served By Precluding Credit Bidding When Property Is Sold Free And Clear Of Liens

1. Credit bidding preserves the settled expectations of secured creditors when they bargain for a security interest

When Congress enacted the Bankruptcy Code, it did not "write 'on a clean slate.'" *Dewsnup v. Timm*,

502 U.S. 410, 419 (1992) (quoting *Emil v. Hanley (In re John M. Russell, Inc.)*, 318 U.S. 515, 521 (1943)). Rather, the Code preserves the bargains made under state law unless some federal interest requires a different result. *Butner v. United States*, 440 U.S. 48, 55 (1979). But petitioners would have this Court create a major change that would upset the expectations of creditors.

A secured creditor bargains for the right to be repaid under certain terms or else to take possession of the collateral—i.e., to get either its money or the property. Thus, in setting the pricing at which they are willing to lend, secured creditors have relied on their ability to foreclose and take possession of the collateral under state law if the loan is not repaid. *Philadelphia Newspapers*, 599 F.3d at 337 (Ambro, J., dissenting); 7 Collier, *supra*, ¶ 1129.04[2][a][v] ("loans have different rates depending" on creditor's collection rights). In addition, the right of the lender to credit bid at a foreclosure sale has a long history under state law. Alan N. Resnick, *Denying Secured Creditors the Right to Credit Bid in Chapter 11 Cases and the Risk of Undervaluation*, 63 Hastings L.J. 323, 331 (2012) ("Credit bidding was recognized under common law."); *see also Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 594-595 (1935) (holding that statute violated Takings Clause because, inter alia, it effectuated the taking of secured creditor's right to bid at sale of collateral).

In giving secured creditors the right to credit bid, Congress thus chose to protect the settled expectations

of the secured creditor when it made the loan. S. Rep. No. 95-989, at 53 (1978) ("Secured creditors should not be deprived of the benefit of their bargain."); H.R. Rep. No. 95-595, at 339 (1977) (same). As Judge Ambro correctly explained, under the "settled expectations of secured lending," a secured creditor is "assured of (1) retaining its lien on collateral and a payment stream, (2) a sale of collateral free of its liens with a corresponding right to credit bid, or (3) equivalent substitute collateral or the ability to take abandoned collateral." *Philadelphia Newspapers*, 599 F.3d at 337 (Ambro, J., dissenting). This Court should uphold that choice.

2. *Credit bidding furthers the policy of maximizing the value of the bankruptcy estate*

Credit bidding also furthers the "general Code policy of maximizing the value of the bankruptcy estate." *Toibb v. Radloff*, 501 U.S. 157, 163 (1991) (citing *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 351-354 (1985)). Credit bidding, by definition, increases the number of available bidders at the auction. The estate benefits from increased competition between the bidders, because the auction price is more likely to be bid up. Vincent S. J. Buccola and Ashley C. Keller, *Credit Bidding and the Design of Bankruptcy Auctions*, 18 Geo. Mason L. Rev. 99, 117-120 (2010).

For example, if an asset is being auctioned and the stalking horse has an opening bid of $50,000 but the secured creditor has a $70,000 lien, if credit

bidding is permitted then there is a much greater chance that the stalking horse bidder will have to bid more than $50,000 to obtain the property. Without credit bidding, if the secured creditor is unable to come up with cash to bid, then the stalking horse is constrained only if there are other bidders that have enough cash in hand to outbid the stalking horse's opening bid. "Forbidding the credit bidder from credit bidding thus reduces the expected returns from the sale." *Id.* at 120.

By creating a better chance that the auction will result in a higher bid, credit bidding also helps other creditors. In the above example, credit bidding is more likely to result in a final sale at auction of $80,000, which is $10,000 more than the total secured claim. "In that case, the lender is paid in full, and the excess proceeds are returned to the debtor for distribution to other creditors." Jason S. Brookner, Pacific Lumber *and* Philadelphia Newspapers*: The Eradication of a Carefully Constructed Statutory Regime Through Misinterpretation of Section 1129(b)(2)(A) of the Bankruptcy Code*, 85 Am. Bankr. L.J. 127, 141 (2011). Therefore, the estate as a whole benefits from credit bidding.

Moreover, the secured creditor is a "key market participant" that likely has a better-informed view about the true value of the collateral and has "a vested interest in the outcome of the auction." *Id.* at 146; *see also* Buccola & Keller, *supra*, 18 Geo. Mason L. Rev. at 120. Precluding credit bidding may exclude the party that has the most interest and incentive to

value the property highly and thus may result in leaving "money on the table." Buccola & Keller, *supra*, 18 Geo. Mason L. Rev. at 120.

The secured creditor may choose not to credit bid its entire claim. Instead, it may credit bid to force the cash bids of others up to a point somewhere close to what it thinks the actual value of the collateral is, then take the proceeds. Thus, even if the lender does "not desire to own the property," it "may still increase its bid by using a credit bid to maximize its own return on its collateral." Brookner, *supra*, 85 Am. Bankr. L.J. at 141. Many secured creditors would rather take cash than have to deal with sustaining and then disposing of collateral.

Credit bidding also reduces transaction costs. If the "lender does not have sufficient liquidity to make a cash bid or needs to incur short-term borrowing costs," then "the need to make a cash bid instead of a credit bid could prove costly for the lender." Resnick, *supra*, 63 Hastings L.J. at 355. Generating cash to bring to the auction often means that the creditor must try to secure funding from banks—which is not free. "The Bank, after all, is not a charitable enterprise. If the creditor seeks a loan, even one with a short duration that is highly secured, he will have to pay the Bank for the use of its money." Buccola & Keller, *supra*, 18 Geo. Mason L. Rev. at 121. The "interest and fees" charged to the creditor "will reduce the amount the credit bidder is willing to bid for debtor's assets on a one-for-one basis," *ibid.*, which potentially reduces the final sale amount and the

cash flowing into the estate. By the same token, the secured creditor may be forced to "sacrifice short-term opportunity costs with regard to other potential uses" of the cash that it must commit to an auction of its collateral for at least some period of time. Resnick, *supra*, 63 Hastings L.J. at 355.

This also assumes, incorrectly, that the creditor always will be able to generate cash for a bid. Banks "do not hand out $740 million or $300 million casually. They require time to conduct due diligence to ensure that, for instance, the secured creditor actually has a perfected security interest in all of the collateral up for sale." Buccola & Keller, *supra*, 18 Geo. Mason L. Rev. at 123-124. Because "the time between the announcement and performance of the auction can be as truncated as a matter of days, secured creditors may lack the time to secure capital." *Id.* at 124 (footnote omitted). Indeed, "the recent financial crisis confirms that there are periods where capital is scarce even to the most credit-worthy borrowers." *Ibid.* In such times, lenders themselves may therefore be short of capital for cash bidding on a loan they made in better times. Some lenders may be contractually prohibited from incurring debt. Thus, "prohibiting credit bidding is often the same as preventing the secured creditors from submitting a bid" at all. *Id.* at 123.

3. *Petitioners' approach serves no legitimate bankruptcy interest*

Petitioners' approach, by contrast, serves no legitimate bankruptcy policy. The only reason to deny

credit bidding here would be to allow the Stalking Horse to obtain the property for a lower-than-market price. Denying credit bidding does nothing for the estate.

To the contrary, it "undermine[s] the Bankruptcy Code by skewing the incentives of the debtor to maximize benefits for insiders, not creditors." *Philadelphia Newspapers*, 599 F.3d at 337 (Ambro, J., dissenting). It opens up the process to manipulation, malfeasance, and favoritism. It enables the stalking horse to attempt to "acquire the debtor's assets on the cheap" by taking advantage of the secured creditor's potential inability to cash bid—i.e., "seizing upon coordination difficulties inherent in the administration of a large syndicated loan that might actually prevent the multiple secured lenders from writing a check to themselves." Ralph Brubaker, *Cramdown of an Undersecured Creditor Through Sale of the Creditor's Collateral: Herein of Indubitable Equivalence, the § 1111(b)(2) Election, Sub Rosa Sales, Credit Bidding, and Disposition of Sale Proceeds*, 29 Bankr. L. Letter No. 12, at 12 (Dec. 2009).

Indeed, this case illustrates the very risks against which Congress was legislating. When the bankruptcy petition was filed in this case, petitioners owed over $120 million on the secured claim at issue, with over $1 million in interest accruing each month. Pet. App. 4a-5a. Yet petitioners proposed to sell their assets to a Stalking Horse for only $47.5 million, subject to a higher bid at auction. Pet. App. 5a-6a. The Stalking Horse bid amount reflected that, by

some tens of millions of dollars, there is no equity in petitioners' assets in excess of the value of respondent's liens, without even taking into account any of the alleged mechanics liens that have been asserted against the properties.

For that reason, petitioners' plan could have benefitted only the Stalking Horse (or the prevailing bidders). The Stalking Horse demanded the "no credit bidding" requirement. J.A. 131. The only other possible beneficiaries were insiders. If the Stalking Horse is the winning bidder, the deal was structured to permit petitioners' insider to acquire a minority interest in the Stalking Horse. J.A. 105. If the Stalking Horse bidder were to prevail at the auction, the existing management company would continue managing the hotel. That management company is owned and controlled by the same insider. J.A. 105.

Petitioners assert that credit bidding makes it more difficult for a Chapter 11 plan to be confirmed (Pet. Br. 51-53), but that is not so. In general, it should be of no consequence to the debtor which of the bidders wins at the auction. If the secured creditor uses its credit at the auction and obtains the asset, that benefits the estate just as much as if another party wins and pays cash for the asset. Whether the winning bidder wins with credit or with cash, either way the estate's debt is reduced by the same amount. Nor is the provision of cash preferable to credit bidding, for until the secured creditor's claim

is satisfied in full, no cash can go to other creditors. Brookner, *supra*, 85 Am. Bankr. L.J. at 141-142.

Moreover, there is simply no reason to force the secured creditor to put money into the estate in the form of a cash bid simply to eventually put it back in its own pocket. Surely Congress did not contemplate the "senseless shuffling of funds from the Bank to the creditor to the debtor to the creditor back to the Bank," with the transaction costs to be borne by the secured creditor for no substantive reason. Buccola & Keller, *supra*, 18 Geo. Mason L. Rev. at 102; *see also* Brubaker, *supra*, 29 Bankr. L. Letter at 12 ("What legitimate reason is there to require the lender to essentially write a check to itself?"). Finally, by ensuring the inclusion of at least one more qualified bidder, and thereby potentially generating more value to the estate, credit bidding makes it *more* likely that a plan will be confirmable.

Petitioners are wrong to suggest that an auction without credit bidding generates "cash available to fund a chapter 11 plan for creditors." Pet. Br. 52. "In general, no other parties or creditors may receive any proceeds from the sale of the collateral unless and until the lender is paid in full or agrees otherwise." Brookner, *supra*, 85 Am. Bankr. L.J. at 141-142. Absent the secured creditor's consent, expenses cannot be charged against secured creditors unless they fall within the Section 506(c) exception. *In re Trim-X, Inc.*, 695 F.2d 296, 301 (7th Cir. 1982). Section 506(c) allows deduction only of "reasonable, necessary costs and expenses of preserving, or disposing of" property

securing a claim, and only "to the extent of any benefit to the holder of such claim." 11 U.S.C. § 506(c). Thus, even under petitioners' theory, in which debtors could proceed under clause (iii), the proceeds of any sale of the secured creditor's collateral would belong to the secured creditor. The debtor cannot use the secured creditor's cash proceeds to fund other creditors *and* to strip the secured creditor of its lien.[12]

What petitioners actually complain of is that credit bidding here—in a single-asset bankruptcy—makes it more difficult for the debtor to propose a confirmable plan in which it will shed the lien attached to all its assets and transfer the assets to a favored Stalking Horse or some other third party at below market value. But benefitting insiders, or even totally unrelated third-party purchasers, at the expense of secured creditors is not a legitimate bankruptcy policy. There is no preference in the Bankruptcy Code for the debtor to be able to choose who the winning bidder at an asset sale will be—even when the sale is essentially a sale of all the debtor's assets. This is even more so because, as noted above, other creditors will not benefit (even from a cash bid by the secured creditor) until and unless cash is bid in the full amount of the secured claim plus one

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[12] Indeed, even if petitioners could proceed under clause (iii), petitioners' plan to use the cash derived from the sale of the collateral to pay other creditors or to pay expenses is fatal to confirmation. *See* 11 U.S.C. § 506(c); 7 Collier, *supra*, ¶ 1129.03[4][a][i] (discussing absolute priority rule).

dollar. Hence, there is no bankruptcy justification for petitioners' approach.

D. The Legislative History Confirms That Credit Bidding Is Required

The legislative history of the Bankruptcy Code demonstrates that Congress intended credit bidding to fulfill the same protection against undervaluation of collateral that is provided under Section 1111(b). The reason expressly stated for excluding the Section 1111(b) election where the asset is to be sold is that the secured creditor has the right to credit bid at the sale: "Sale of property under section 363 or under the plan is excluded from treatment under section 1111(b) because of the secured party's right to bid in the full amount of his allowed claim at any sale of collateral under section 363(k) * * * ." 124 Cong. Rec. 32,407 (1978) (statement of Rep. Edwards).

Moreover, there is no discussion of Section 1129(b)(2)(A)(ii) in the legislative history because "Clause (ii) is self explanatory." *Ibid.*

Finally, the discussion of clause (iii)'s "indubitable equivalent" standard in the legislative history suggests that clause (iii) governs situations other than those covered by clause (ii). The examples of what would be the indubitable equivalent are "[a]bandonment of the collateral to the creditor" and "a lien on similar collateral." *Ibid.*

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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MARCH 2, 2012

APPENDIX

TITLE 11 – BANKRUPTCY

CHAPTER 3 – CASE ADMINISTRATION

SUBCHAPTER IV – ADMINISTRATIVE POWERS

§ 363. Use, sale, or lease of property

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless –

(A) such sale or such lease is consistent with such policy; or

(B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease –

(i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

(ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

(2) If notification is required under subsection (a) of section 7A of the Clayton Act in the case of a transaction under this subsection, then –

(A) notwithstanding subsection (a) of such section, the notification required by such subsection to be given by the debtor shall be given by the trustee; and

(B) notwithstanding subsection (b) of such section, the required waiting period shall end on the 15th day after the date of the receipt, by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, of the notification required under such subsection (a), unless such waiting period is extended –

(i) pursuant to subsection (e)(2) of such section, in the same manner as such subsection (e)(2) applies to a cash tender offer;

(ii) pursuant to subsection (g)(2) of such section; or

(iii) by the court after notice and a hearing.

(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless –

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the

trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section only –

(1) in accordance with applicable nonbankruptcy law that governs the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust; and

(2) to the extent not inconsistent with any relief granted under subsection (c), (d), (e), or (f) of section 362.

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if –

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

(g) Notwithstanding subsection (f) of this section, the trustee may sell property under subsection (b) or (c) of this section free and clear of any vested or contingent right in the nature of dower or curtesy.

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if –

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

(i) Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

(*l*) Subject to the provisions of section 365, trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12, or 13 of this title may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

(n) The trustee may avoid a sale under this section if the sale price was controlled by an agreement

among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

(o) Notwithstanding subsection (f), if a person purchases any interest in a consumer credit transaction that is subject to the Truth in Lending Act or any interest in a consumer credit contract (as defined in section 433.1 of title 16 of the Code of Federal Regulations (January 1, 2004), as amended from time to time), and if such interest is purchased through a sale under this section, then such person shall remain subject to all claims and defenses that are related to such consumer credit transaction or such consumer credit contract, to the same extent as such person would be subject to such claims and defenses of the consumer had such interest been purchased at a sale not under this section.

(p) In any hearing under this section –

(1) the trustee has the burden of proof on the issue of adequate protection; and

(2) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.

CHAPTER 5 – CREDITORS, THE DEBTOR, AND THE ESTATE

SUBCHAPTER I – CREDITORS AND CLAIMS

§ 506. Determination of secured status

(a)(1) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(2) If the debtor is an individual in a case under chapter 7 or 13, such value with respect to personal property securing an allowed claim shall be determined based on the replacement value of such property as of the date of the filing of the petition without deduction for costs of sale or marketing. With respect to property acquired for personal, family, or household purposes, replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim, including the payment of all ad valorem property taxes with respect to the property.

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless –

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

CHAPTER 11 – REORGANIZATION

SUBCHAPTER I – OFFICERS AND ADMINISTRATION

§ 1111. Claims and interests

(a) A proof of claim or interest is deemed filed under section 501 of this title for any claim or interest that appears in the schedules filed under section 521(1) or 1106(a)(2) of this title, except a claim or interest that is scheduled as disputed, contingent, or unliquidated.

(b)(1)(A) A claim secured by a lien on property of the estate shall be allowed or disallowed under section 502 of this title the same as if the holder of such claim had recourse against the debtor on account of such claim, whether or not such holder has such recourse, unless –

(i) the class of which such claim is a part elects, by at least two-thirds in amount and more than half in number of allowed claims of such class, application of paragraph (2) of this subsection; or

(ii) such holder does not have such recourse and such property is sold under section 363 of this title or is to be sold under the plan.

(B) A class of claims may not elect application of paragraph (2) of this subsection if –

(i) the interest on account of such claims of the holders of such claims in such property is of inconsequential value; or

(ii) the holder of a claim of such class has recourse against the debtor on account of such claim and such property is sold under section 363 of this title or is to be sold under the plan.

(2) If such an election is made, then notwithstanding section 506(a) of this title, such claim is a secured claim to the extent that such claim is allowed.

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§ 1129. Confirmation of plan

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of this title.

(2) The proponent of the plan complies with the applicable provisions of this title.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

(4) Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

(5)(A)(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

(ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and

(B) the proponent of the plan has disclosed the identity of any insider that will be employed

or retained by the reorganized debtor, and the nature of any compensation for such insider.

(6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.

(7) With respect to each impaired class of claims or interests –

(A) each holder of a claim or interest of such class –

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

(8) With respect to each class of claims or interests –

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that –

(A) with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

(B) with respect to a class of claims of a kind specified in section 507(a)(1), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, each holder of a claim of such class will receive –

(i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim;

(C) with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim regular installment payments in cash –

(i) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim;

(ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and

(iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b)); and

(D) with respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C).

(10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

(12) All fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

(13) The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of

this title, at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.

(14) If the debtor is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor has paid all amounts payable under such order or such statute for such obligation that first become payable after the date of the filing of the petition.

(15) In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan –

(A) the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.

(16) All transfers of property of the plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that

is not a moneyed, business, or commercial corporation or trust.

(b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides –

(i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

(B) With respect to a class of unsecured claims –

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.

(C) With respect to a class of interests –

(i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such

holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or

(ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

(c) Notwithstanding subsections (a) and (b) of this section and except as provided in section 1127(b) of this title, the court may confirm only one plan, unless the order of confirmation in the case has been revoked under section 1144 of this title. If the requirements of subsections (a) and (b) of this section are met with respect to more than one plan, the court shall consider the preferences of creditors and equity security holders in determining which plan to confirm.

(d) Notwithstanding any other provision of this section, on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933. In any hearing under this subsection, the governmental unit has the burden of proof on the issue of avoidance.

(e) In a small business case, the court shall confirm a plan that complies with the applicable provisions of this title and that is filed in accordance with section 1121(e) not later than 45 days after the

plan is filed unless the time for confirmation is extended in accordance with section 1121(e)(3).

REPLY BRIEF

RECORD
AND
BRIEFS

No. 11-166

In the Supreme Court of the United States

RADLAX GATEWAY HOTEL, LLC
and RADLAX GATEWAY DECK, LLC,
Petitioners,

v.

AMALGAMATED BANK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' REPLY BRIEF

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CORPORATE DISCLOSURE

The corporate disclosure statement included in the petition for writ of certiorari remains accurate.

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PETITIONERS' REPLY BRIEF

Lender and its *amici* avoid any meaningful analysis of the language and structure of 11 U.S.C. § 1129(b)(2)(A), instead invoking alternative canons of interpretation and countervailing policy concerns to support their argument that chapter 11 plans involving the sale of property free of liens may be confirmed only if the secured creditor is allowed to credit bid under subsection (ii). They argue that secured creditors must have the presumptive right to credit bid to protect against judicial undervaluation of their collateral and debtor malfeasance. Neither of those concerns is present in this case, however, and, in any event, they cannot override the plain meaning of § 1129(b)(2)(A).

Lender accuses the Debtors of proposing the sale without credit bidding to benefit an insider, Peter Dumon, by directing the sale of their assets to a favored stalking horse bidder. That is false and contrary to the record: the Debtors' insiders have no ownership interest in the stalking horse, and Dumon does not own the hotel management company. The Debtors are not pursuing the sale for their own benefit, but rather to fulfill their fiduciary duty to maximize the value of their estate and confirm a chapter 11 plan for the benefit of *all* creditors. The proposed bid procedures at issue here are designed to achieve the fair market value of the Debtors' assets at an open and fully advertised auction, thereby avoiding concerns about judicial undervaluation.

Lender's goal in this case is clear: to take back its collateral for its exclusive benefit and prevent any possibility of confirming a chapter 11 plan for the

benefit of all creditors. To that end, Lender insists on the presumptive right to credit bid in any plan sale free of liens. But that interpretation is contrary to a natural reading of § 1129(b)(2)(A) and would give secured creditors an unconditional veto over any proposed sale of their collateral in bankruptcy. Such an approach would foreclose the possibility of bankruptcy relief for a broad category of deeply distressed enterprises where the secured creditor's claim far exceeds the value of the collateral—a result antithetical to the rehabilitative purpose of the Bankruptcy Code. The Court should reject that outcome because it is inconsistent with the text of § 1129(b)(2)(A) and serves no legitimate bankruptcy purpose.

A. Congress Did Not Limit the Application of Subsection (iii)

Lender asserts that § 1129(b)(2)(A)(ii) is the exclusive method by which a debtor may confirm a chapter 11 plan that involves the sale of property free of liens. Several, but not all, of its *amici* agree.[1] Although a plan that permits credit bidding under subsection (ii) would meet the statutory requirement for fair and equitable treatment of secured creditors, nothing in the text or legislative history of § 1129(b)(2)(A) suggests that subsection (ii) is the

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[1] It is not surprising that Lender has *amicus* support and the Debtors do not. Numerous well-financed trade organizations promote the interests of secured lenders, but there are no industry groups to advance the interests of chapter 11 debtors. Notably, however, Lender's *amici* do not agree on the proper statutory analysis. Indeed, the Bankruptcy Scholars acknowledge (at 9–12) that "Petitioners are right about the meaning of subsection (b)(2)(A)."

only way to satisfy that standard. To the contrary, the statute provides three alternative ways by which a debtor can provide fair and equitable treatment. If any one is satisfied, the plan meets the statutory requirement for confirmation notwithstanding the dissent of a secured creditor.

1. The Statutory Text Supports the Debtors' Reading of § 1129(b)(2)(A)

The Debtors' opening brief identified numerous features of § 1129(b)(2)(A) that support the conclusion that they may confirm their plan under subsection (iii). Lender's attempts to counter them are unavailing.

First, the three alternatives in § 1129(b)(2)(A) are connected by the disjunctive "or." Section 102(5) of the Bankruptcy Code defines "or" as "not exclusive." 11 U.S.C. § 102(5). It follows that the Debtors need to satisfy only one of the three alternatives. Lender argues (at 22) that "'or' just means that the debtor need not satisfy all three clauses." But it also means that subsection (ii) is not the exclusive way the Debtors may confirm their plan over Lender's objection. Instead, the Debtors may choose any one of the three alternatives. Lender's preferred interpretation of the statute impermissibly transforms "or" into "and" by requiring the Debtors to provide the indubitable equivalent of Lender's claim under subsection (iii) *and* credit bidding under subsection (ii). *See Scotia Pacific Co. v. Official Unsecured Creditors' Comm. (In re Pacific Lumber Co.)*, 584 F.3d 229, 245 (5th Cir. 2009).

Second, § 1129(b)(2)(A)'s introductory phrase "the plan provides" confirms that the plan proponent may choose which of the three alternatives to pursue. Lender concedes this point (at 32), but nonetheless insists that a plan proposing to sell property may be confirmed only through subsection (ii). There is no support for such a limitation in the statutory text.

Third, Congress' use of the term "includes" in the opening clause of § 1129(b)(2) means that there are no limitations on the three alternatives. *See* 11 U.S.C. § 102(3) (defining the term "includes" in the Code as "not limiting"). Yet Lender argues (at 30–32) for the opposite interpretation: that subsection (iii) *is* limited to plans that do not fit within subsections (i) or (ii). Had Congress intended that result, it would have included such a limitation in the statute—as it did in the only other section of the Code that uses the indubitable equivalent standard (11 U.S.C. § 361(3)) and in other sections of the Code where Congress limited the application of certain subsections (*see* Pet. Br. 20 (listing numerous examples in the Bankruptcy Code where Congress expressly limited the application of a subsection)).

Lender acknowledges (at 48) that § 361(3) imposes express limits on the "indubitable equivalent" option and § 1129(b)(2)(A) does not, but hypothesizes that the Debtors would advance the same argument even if similar limiting language were also used in § 1129(b)(2)(A). But the fact remains that Congress did *not* provide any such limiting language in § 1129(b)(2)(A). Furthermore, Lender ignores that Congress could easily have included the limiting phrase "except as provided in subsections (i) and (ii)" in § 1129(b)(2)(A)(iii), but chose not to do so even

though Congress included that precise language in numerous other sections of the Code. *See* Pet. Br. 20 (citing examples).

Lender's discussion of 11 U.S.C. § 1123(a)(5)(D) (at 46–47) is similarly flawed. That provision expressly permits a debtor to sell assets free of liens as a way to implement its plan, yet it does not impose a credit bidding requirement.[2] Lender also ignores that Congress did not extend the right to credit bid under 11 U.S.C. § 363(k) to all chapter 11 plans, even though the very next subsection, § 363(*l*), applies by its terms to all chapter 11 plans.

2. Lender's Favored Canons of Construction Do Not Apply

Because subsection (iii) contains no limitations, Lender resorts (at 27–28) to the canon of statutory construction that a specific statutory provision governs a general provision that addresses the same issue. That canon, however, applies only where the general provision is an exclusive subset of the specific provision. *See Bloate v. United States*, 130 S. Ct. 1345, 1354 (2010); *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 335–36 (2002) ("The specific controls but only within its self-described scope."). Here each subsection of § 1129(b)(2)(A) provides a different way to establish fair and equitable treatment for secured creditors. In particular, subsection (ii) provides the procedural

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[2] Lender's suggestion (at 46) that 11 U.S.C. § 1123(a)(5)(D) "creates no substantive right to sell property free and clear of liens" is incorrect. Section 1123(a)(5) specifically lists ways in which a debtor may "provide adequate means for the plan's implementation," including the sale of property free of liens.

protection of credit bidding without regard to the substantive outcome of the sale. Subsection (iii), in contrast, provides the substantive protection of indubitable equivalence without mandating any particular procedure. Because each subsection covers situations not covered by the other subsection, the canon on which Lender relies does not apply. *See In re Philadelphia Newspapers, LLC*, 599 F.3d 298, 307–08 (3d Cir. 2010).

The fact that subsection (ii) refers to treatment of a lien on the proceeds from the sale through subsections (i) or (iii) does not change the result. It simply means that a sale is fair and equitable when it allows credit bidding *and* distributes any sale proceeds under subsections (i) or (iii). In that situation, the debtor does not need to demonstrate that the sale generated fair market value or that the proceeds are the indubitable equivalent of the secured creditor's claim, as it would under subsection (iii).

Lender does not dispute that subsection (ii) is procedural and subsection (iii) is substantive, but rejoins (at 33) that "the credit-bidding requirement of clause (ii) [cannot] be evaded by resort to clause (iii)." Lender mischaracterizes how the three statutory alternatives in § 1129(b)(2)(A) work. Each subsection is a way to provide fair and equitable treatment; if any one is satisfied, a debtor may confirm its plan over the dissent of the secured creditor. The Debtors are not "evading" the credit bidding requirement by pursing their plan under subsection (iii) any more than they would be "evading" the indubitable equivalent requirement by pursuing their plan under subsection (ii). The Debtors are simply pursuing one

option—subsection (iii)—specifically provided by Congress for confirming their chapter 11 plan over the objection of Lender. The text and structure of § 1129(b)(2)(A) plainly permit this possibility.

Lender is also wrong to suggest that the Debtors' reading of § 1129(b)(2)(A) renders subsection (ii) superfluous. Indeed, its example (at 51–52) of a $50,000 stalking horse bid on an asset encumbered by a $70,000 claim proves this point. In that case, the debtor may prefer to proceed under subsection (ii) and permit credit bidding because it might generate a surplus for the estate and would relieve the debtor of proving indubitable equivalence. Similarly, a debtor with multiple assets, not all of which are necessary for reorganization, may prefer to sell the unneeded property under subsection (ii) rather than have to prove indubitable equivalence. But where certain property *is* crucial to a successful exit from bankruptcy, such as in *Pacific Lumber*, the debtor needs the flexibility to transfer property without credit bidding. Subsection (iii) allows this possibility, but only if the debtor can prove that the secured creditor will receive the indubitable equivalent of its secured claim.

3. Subsection (iii) Is Not Restricted to Plans that Could Not Be Confirmed Under Subsections (i) or (ii)

Lender's argument (at 18) that subsection (iii) applies only to plans that cannot fit within the scope of subsections (i) and (ii) is also misguided. As demonstrated above, nothing in the statutory text imposes such a restriction. Furthermore, Lender concedes (at 26) that subsection (iii) can be satisfied

by providing substitute collateral. In doing so, the debtor could propose a repayment plan that provides a lien on different collateral under subsection (iii) instead of retaining the secured creditor's lien on the same collateral as required under subsection (i).[3]

The Debtors' plan here provides more certainty for Lender than substitute collateral. It pays Lender cash equal to the fair market value of its collateral determined at an open auction. If substitute collateral is a permissible use of subsection (iii), then full payment in cash equal to the present value of the collateral must be as well.

Lender claims (at 26) that surrendering collateral to the secured creditor is a "classic example" of indubitable equivalence under subsection (iii). Perhaps so, but Congress did not limit subsection (iii) to surrendering collateral, as it did in chapters 12 and 13 of the Code. *Cf.* 11 U.S.C. §§ 1225(a)(5), 1325(a)(5).

B. Subsection (iii) Provides an Alternative But Equal Protection to Secured Creditors

Lender further argues (at 34) against a plain reading of § 1129(b)(2)(A) by claiming that the indubitable equivalent requirement under subsection (iii) provides "a more generous" alternative to the credit bidding requirement under subsection (ii). That is not so. The Bankruptcy Code protects the secured creditor's interest in the present value of its

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[3] The structure of § 1129(b)(2)(A) also allows a debtor to use subsection (i) *with* subsection (iii) by providing a stream of payments under subsection (i) and surrendering other collateral back to the secured creditor under subsection (iii).

collateral. *See* Pet. Br. 24–27. To that end, each of the three subsections of § 1129(b)(2)(A) guarantees that the secured creditor will realize at least this amount if a plan is confirmed over its objection. Subsection (i) requires a stream of deferred payments with a present value at least equal to the current value of the collateral. Subsection (ii) allows the secured creditor to take back its collateral (thus realizing its present value) through a credit bid. And subsection (iii) requires a debtor to provide the secured creditor with money or property that is the indubitable equivalent of the present value of the collateral. One alternative is not "more generous" than the other. Rather, each provides the same economic benefit to the secured creditor. *See* Pet. Br. 26 (providing a mathematical example).

In this way, § 1129(b)(2)(A) strikes a careful balance between protecting the secured creditor's interest in the value of its collateral and allowing the debtor flexibility to confirm a chapter 11 plan. The Fifth Circuit's decision in *Pacific Lumber*, which Lender and its *amici* ignore, illustrates how the alternatives in § 1129(b)(2)(A) permitted confirmation of a plan that benefited all stakeholders despite a secured creditor's objection. *See* Pet. Br. 49–51.

The protections provided by § 1129(b)(2)(A) also respect the constitutional limitations on modifying a secured creditor's rights in bankruptcy. In *Wright v. Union Central Life Insurance Co.*, 311 U.S. 273 (1940), the Court considered the constitutionality of the treatment of secured creditors under the Frazier-Lemke Amendments to the Bankruptcy Act. The Court recognized that "[s]afeguards were provided to protect the rights of secured creditors, throughout

the proceedings, to the extent of the value of the property," but that "[t]here is no constitutional claim of the creditor to more than that." *Id.* at 278–79. Section 1129(b)(2)(A) incorporates this principle in its three subsections, each of which preserves the secured creditor's right to realize the value of its collateral under a chapter 11 plan that it rejects.[4]

The Debtors' construction of § 1129(b)(2)(A) is consistent with Judge Learned Hand's use of the phrase "indubitable equivalence" in *Metropolitan Life Insurance Co. v. Murel Holding Corp. (In re Murel Holding Corp.)*, 75 F.2d 941 (2d Cir. 1935), on which Congress relied when enacting subsection (iii). In *Murel*, the court rejected a plan of reorganization under § 77B of the Bankruptcy Act that proposed to pay the secured creditor interest on its collateral for 10 years, with no payment of principal until the end of the term. Judge Hand explained that a creditor who fears the safety of its principal "wishes to get his money or at least the property" and that "[w]e see no reason to suppose that the statute was intended to deprive him of that in the interest of junior holders, unless by a substitute of the most indubitable equivalence." *Id.* at 942. In other words, a secured creditor is entitled to full payment, the collateral, or other property equal to the value of its collateral. Those three options are reflected in the three subsections of § 1129(b)(2)(A), all three of which permit a debtor to confirm a plan by providing its

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[4] There is thus no merit to the suggestion by one *amicus* (Professor Aaron et al.) that credit bidding must be required for all plan sales under § 1129(b)(2)(A) to avoid a constitutional question. Indeed, such an interpretation would cast doubt over the constitutionality of the "for cause" exception to credit bidding that Congress added to 11 U.S.C. § 363(k) in 1984.

secured creditor with the indubitable equivalent of the present value of the collateral.[5]

This result is also consistent with prior practice under Chapter XII of the Bankruptcy Act, which governed reorganization plans involving real property. Under that statute, a debtor could implement a plan of arrangement (reorganization) over the dissent of a secured creditor if it provided the objecting creditor with "adequate protection." Section 461(11) of the Act enumerated ways in which the debtor could provide adequate protection, including (1) retention or sale of the property subject to the debt, (2) sale of the property free of the debt, with the debt attaching to the proceeds, (3) payment of the appraised value of the property, or (4) some other method that would "equitably and fairly provide such protection." Chandler Act of 1938, ch. 575, § 461(11), 52 Stat. 840 (1976) (repealed in 1978). Just like the three alternatives for providing fair and equitable treatment under § 1129(b)(2)(A) of the Code, these options protected the secured creditor's interest in the present value of its collateral, but provided the debtor with flexibility to confirm a plan to benefit all creditors despite the dissent of its secured creditor. Lender and its *amici* repeatedly urge that Congress did not "write on a blank slate" when it adopted § 1129(b)(2)(A) in 1978, yet they ignore how Chapter XII of the Bankruptcy Act

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[5] Professor Aaron et al.'s argument that *Murel* requires the indubitable equivalent of the secured creditor's *right to credit bid* is incorrect. Credit bidding was not at issue in that case. Instead, Judge Hand held that the creditor must provide the indubitable equivalent of the *collateral* (i.e., something unquestionably equal in value to the collateral, *see Philadelphia Newspapers*, 599 F.3d at 310).

treated liens, which contradicts their claim that secured creditors have always had the right to receive payment in full or take back their collateral.

Lender nonetheless insists (at 22) that the Bankruptcy Code entitles it to credit bid and take back its collateral in all plan sales. But as shown above, subsection (iii) provides an alternative way to cram down a chapter 11 plan by providing the secured creditor with property at least equal to the present value of its collateral. This alternative provides the same protection to the secured creditor. For example, there is no economic disadvantage in receiving $70,000 in cash rather than repossessing collateral worth $70,000. As such, Lender cannot complain that it would be denied the benefit of its pre-bankruptcy bargain. Even if it could, that consideration is insufficient to override the statutory text. *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 379–80 (1988). Indeed, Lender acknowledges that an immediate cash distribution may be *preferable* to receiving the collateral itself. *See* Resp. Br. 53 ("Many secured creditors would rather take cash than have to deal with sustaining and then disposing of collateral."). Likewise, full payment of cash now may be preferable to a more speculative stream of deferred payments from a bankrupt borrower at a less favorable interest rate than the lender could obtain from a borrower outside of bankruptcy. *See Till v. SCS Credit Corp.*, 541 U.S. 465, 477 (2004) (precluding profit as a consideration in determining an appropriate interest rate in a bankruptcy plan).

Ultimately, Lender's arguments betray Lender's real objective in this case: to thwart the Debtors'

plan confirmation efforts by using a credit bid to obtain its collateral and prevent distributions to other creditors.[6] If credit bidding were required for all plan sales, Lender could prevent any sale over its objection because it could bid the entire amount of its claim (which far exceeds the estimated value of the property) to defeat any third-party cash bids. There would be no reason to proceed with an auction because the outcome would be preordained and would fail to generate any cash to fund a chapter 11 plan. The bankruptcy court would thus grant Lender relief from the automatic stay under 11 U.S.C. § 362(d) to foreclose on its collateral. Indeed, the same determination could be made at the outset of many bankruptcy cases where, as here, the secured creditor's claim greatly exceeds the value of its collateral. Such a result would defeat one of the primary purposes of the Bankruptcy Code, which is to foster consensual resolutions among various stakeholders, not to give secured lenders an unconditional veto over the chapter 11 process.

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[6] The evidence strongly suggests that Lender has no interest in any result other than foreclosure. It declined to file its own chapter 11 plan in this case even though the bankruptcy court terminated the Debtors' exclusive period to file a plan on August 30, 2010 at Lender's request. *See In re RadLAX Gateway Hotel, LLC*, Case No. 09-30047, Dkt No. 338 (Bankr. N.D. Ill.). Any such plan would be the functional equivalent of a credit bid, as it was in the companion *River Road* cases, where the lenders confirmed a chapter 11 plan and obtained title to their collateral in exchange for a reduction in debt while still providing some distributions to other creditors. *See In re River Road Hotel Partners, LLC*, Case No. 09-30029, Dkt. Nos. 840, 853 (Bankr. N.D. Ill).

C. There Is No Risk of Judicial Undervaluation

Although Lender and its *amici* insist that an absolute right to credit bid in all plan sales is necessary to protect against the potential undervaluation of collateral, that concern is misplaced. Judicial valuation plays a significant role in many bankruptcy cases. Bankruptcy judges routinely value property for many reasons—for example, to bifurcate claims under 11 U.S.C. § 506(a), to estimate claims under 11 U.S.C. § 502(c), and to determine adequate protection under 11 U.S.C. § 361. Indeed, the bankruptcy judge must value a stream of payments and the current value of collateral to determine the sufficiency of a repayment plan under subsection (i) of § 1129(b)(2)(A). But such valuations are not unique to bankruptcy. Many business decisions outside bankruptcy rely on similar opinions of value, including real property appraisals and business valuation models.

Concerns about judicial valuation are not present where, as here, the collateral is to be sold at an open auction because the market will determine the property's value. *See Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 457–58 (1999). As long as the auction is sufficiently advertised and conducted in a fair and reasonable manner, the results of the sale will, by definition, establish the fair market value of the collateral. Lender's fear of undervaluation is therefore unfounded.

Lender errs in suggesting (at 25) that the design of the proposed auction will cause its collateral to be undervalued. Unlike 11 U.S.C. § 363(b), which

permits *ad hoc* sales of property during the course of a bankruptcy case on 21 days' notice (or less for "cause," *see* Fed. R. Bankr. P. 2002(a)(2)), sales under a chapter 11 plan take much longer due to the time required to approve the disclosure statement and solicit votes for plan confirmation. That process takes at least 56 days and often much longer. *See* Fed. R. Bankr. P. 2002(b). This additional time allows for more robust notice and marketing efforts leading up to the sale. Lender's suggestion (at 54) that "the time between the announcement and performance of the auction can be as truncated as a matter of days" is thus incorrect. These differences, along with the many other protections provided to creditors in a plan context (*see* Pet. Br. 27–28), explain why Congress mandated credit bidding for all *ad hoc* sales of property under § 363(b), but *not* for all sales under a chapter 11 plan.

Furthermore, the Debtors included additional safeguards in their bid procedures that are designed to maximize the purchase price. For example, the Debtors' proposed bid procedures permit the financial advisors responsible for marketing the property and soliciting the stalking horse bidder to continue marketing the auction to other potential bidders through the sale date. J.A. 146. The bid procedures also incorporate ways in which Lender can provide additional input on how to increase the price achieved at the auction. J.A. 143–46, 151, 153–54. The Debtors' proposed auction is thus well designed to foster competitive bidding and realize the fair market value of the property.

Moreover, if Lender nonetheless thinks that the bids received at the auction undervalue its collateral,

Lender can submit its own cash bid. Most of that cash would be immediately returned to it through the plan (except for claims given a higher priority by the Bankruptcy Code).[7] Thus, there is no real risk that Lender will receive anything less than the fair market value of its collateral. Furthermore, the "absolute priority" rule is not implicated as the Debtors' equity holders would retain no interest under the plan and Lender may submit a cash bid at the sale or file its own plan. *See 203 N. LaSalle*, 526 U.S. at 458.

Finally, Lender can still object to plan confirmation on the ground that the Debtors have not satisfied the "indubitable equivalent" standard under subsection (iii) because the sale failed to realize the fair market value of the property. That determination, however, cannot be made until the results of the auction are known. Whether the sale proceeds provide indubitably equivalent value is not ripe at the bid procedures stage of the proceedings, but rather must be evaluated at plan confirmation, after the sale has occurred. Indeed, Lender does not dispute that the auction could generate sufficient proceeds to satisfy the indubitable equivalent standard at confirmation. *See* Resp. Br. 35–36. If the auction does not generate sufficient proceeds to satisfy that requirement, the Debtors would have to amend their plan to supplement the value distributed to Lender. That process is not problematic; it simply reflects the dynamic nature of

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[7] The rationale for setoff in *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16 (1995), is not implicated in plan sales where, as here, there are senior liens (*e.g.*, real estate taxes and mechanics' liens) that must be paid before funds can be returned to the secured creditor.

a chapter 11 proceeding, which is designed to encourage negotiations among various stakeholders through the plan confirmation hearing, with the goal of reaching a consensual resolution. *See 203 N. LaSalle*, 526 U.S. at 457 n.28 (recognizing that "the Chapter 11 process relies on creditors and equity holders to engage in negotiations toward resolution of their interests" (citation omitted)).

D. Credit Bidding Does Not Always Maximize the Value of the Bankruptcy Estate

As further support for its position, Lender argues (at 51–54) that credit bidding is an unalloyed good that will always maximize the value of the bankruptcy estate. Lender is wrong for many reasons.

First, Lender provides no empirical evidence to support its position.[8] Allowing credit bidding where the debt far exceeds any reasonable estimate of the value of the property would almost surely decrease—not increase—the number of bidders at the auction. For example, if Lender is entitled to credit bid the full amount of its claim of more than $120 million at the auction of property worth less than half that amount, few third-party bidders would devote the time and resources required to conduct due diligence and raise sufficient funds to participate, either as a stalking horse or as a bidder at the auction. That is so because they would know that Lender has the ability and motivation to trump any cash bid with its credit bid. Indeed, throughout this case, Lender has

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[8] Lender's argument is derived from one law review article, which in turn lacks any empirical foundation. *See* Vincent S.J. Buccola & Ashley C. Keller, *Credit Bidding and the Design of Bankruptcy Auctions*, 18 GEO. MASON L. REV. 99 (2010).

expressed its desire to thwart any efforts to sell its collateral. Consequently, cash bidders that would otherwise participate in the auction would forgo the sale in light of Lender's outsized credit bid. Lender would be guaranteed to prevail at the auction, take back its collateral, and prevent confirmation of a chapter 11 plan for the benefit of all creditors.[9]

Second, the fact that a credit bid will reduce a secured creditor's claim even more than the highest cash bid is of little solace to other creditors if the debtor is unable to generate cash to confirm a chapter 11 plan.

Third, the ability to credit bid may confer an unfair advantage on the secured creditor. As Lender observes (at 53–54), credit bidding relieves that bidder—but only that bidder—of certain transaction costs associated with borrowing cash, such as loan closing costs and interest. The credit bidder thus pays less than a cash bidder to make the same bid. For example, if transaction costs are 5%, a $100 bid will cost the cash bidder $105 ($100 bid + $5 transaction costs), but will cost the credit bidder only $100. Cash bidders may be less willing to participate in an auction where they must pay more than a competing credit bidder to achieve the same result.

Fourth, credit bidding allows the credit bidder to bid with a currency (its credit) that is inherently less valuable than cash because it may only be used for one purpose: bidding on that creditor's collateral.

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[9] This is also true with a "loan-to-own" lender, where the secured creditor's goal is to obtain title to the asset instead of recovery on its claim. A credit bid in that circumstance would not reflect the fair market value of the collateral.

Cash, on the other hand, is fungible and may be used to bid at the sale of the secured creditor's collateral or deployed for some other purpose. Thus, cash bidders, but not credit bidders, will consider other opportunities, which will temper their willingness to bid at the auction. *See In re Homestead Partners, Ltd.*, 197 B.R. 706, 719 n.15 (Bankr. N.D. Ga. 1996) (recognizing that credit bidding at an auction can be unfair because it allows a competitor to bid with "a currency of no consequence"). The assertion that "credit bidding chills cash bidding no more than a deep-pocketed cash bidder would chill less-well-capitalized cash bidders" misses this crucial distinction. *See Philadelphia Newspapers*, 599 F.3d at 321 (Ambro, J., dissenting).

In sum, allowing credit bidding at every sale of collateral tilts the auction in favor of the secured creditor and against other potential cash bidders for no legitimate reason. As a result, fewer cash bidders may participate in the auction, thereby lowering the potential for the debtor to realize the fair market value of its assets. In contrast, requiring cash bidding for the auction creates no unfair advantage and still allows the Lender to protect any perceived undervaluation of its collateral by bidding cash. It also reflects how property is typically sold outside of bankruptcy, where bidders are required to use cash.

E. The Debtors' Plan Does Not Benefit Insiders or a Favored Third-Party Bidder

Lender and its *amici* repeatedly assert that the Debtors' proposed plan was engineered to sell assets below market value to a favored stalking horse bidder for the benefit of insiders. That claim

misstates the facts. Lender incorrectly relies on an outdated version of the proposed asset purchase agreement with a *different* stalking horse bidder. *See* Resp. Br. 12–13 (citing to J.A. 105). Under the current asset purchase agreement, no insider of the Debtors owns any part of the stalking horse bidder. J.A. 201. Furthermore, Peter Dumon, one of the Debtors' insiders, does not own the hotel management company, and there is no requirement that the winning bidder retain the current management company to manage the hotel. J.A. 146.[10]

Nor are the Debtors trying to sell their property at below market value to a favored stalking horse bidder. To the contrary, the Debtors' proposed bid procedures are designed to maximize the sale price and fund a chapter 11 plan for the benefit of all creditors. The selection of a stalking horse is customary in bankruptcy sales. The stalking horse bidder conducts due diligence and submits an initial bid, which assures the market that the property is worth buying. That bid sets the floor for the auction and is subject to higher and better bids designed to achieve fair market value. In return for making the initial bid, the stalking horse is customarily guaranteed a "break-up fee" if it is not the winning bidder, an amount calculated to reimburse it for its expenses in performing due diligence and negotiating the asset purchase agreement and related docu-

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[10] The only connection between Dumon and the management company is incidental, indirect and *de minimis*: Dumon's wife's trust has a partial ownership interest in an entity that has a minority interest in the hotel's current management company.

ments.[11] The stalking horse process serves to maximize the number of participants and bids at the auction, not minimize it.

Lender's assertion (at 14) that the Debtors would not seek to confirm their initial plan because the stalking horse bid was "many millions of dollars *less* than the value of the property" is also misleading. The initial stalking horse bid of $47.5 million for the hotel was made in June 2010. J.A. 106. This price reflected the stalking horse's view of the market value of the property and the challenging conditions of the credit markets at that time. In February 2011, the Debtors filed a new asset purchase agreement reflecting an increased stalking horse bid of $55 million. J.A. 286. The difference in the two bids reflected the appreciation in the value of the property and recovery of the credit markets over the intervening nine months, not a ploy to sell assets below market value. In any event, the stalking horse bid is not a final bid; it merely sets the floor and is subject to higher bids at an open and advertised auction.

Finally, Lender's contention (at 58–59) that "other creditors will not benefit (even from a cash bid by the secured creditor) until and unless cash is bid in the full amount of the secured claim plus one dollar" is incorrect. As Lender concedes (at 57), the Bankruptcy Code's distribution scheme allows certain priority and administrative claims to be paid ahead of the secured creditor. *See* 11 U.S.C. § 506(c). Additionally, senior liens such as real estate taxes

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[11] The break-up fee in this case was a standard percentage (3%) of the stalking horse bid and subject to bankruptcy court approval.

and mechanics' liens can be paid from a secured creditor's collateral. Furthermore, the sale of property through a chapter 11 plan avoids transfer taxes, which can be significant in a case like this. 11 U.S.C. § 1146(a). Finally, the Debtors can require distributions to general unsecured creditors through a chapter 11 plan from the future operating profits of the hotel. By twice denying Lender's motions for relief from the automatic stay, the bankruptcy court has rejected Lender's argument that only Lender may reap the benefits of the sale.

In sum, the Court should allow the Debtors to discharge their responsibility as fiduciaries for all creditors of their estates, and should not require them to capitulate for the sole benefit of Lender. *See Wolf v. Weinstein*, 372 U.S. 633, 649 (1963) ("But so long as the Debtor remains in possession, it is clear that the corporation bears essentially the same fiduciary obligation to the creditors as does the trustee for the Debtor out of possession."). Indeed, the Debtors' role to act on behalf of all creditors is especially important in this case because no committee of unsecured creditors was appointed to represent their interests.

CONCLUSION

The judgment of the Seventh Circuit should be reversed and the case remanded to the bankruptcy court for consideration of the Debtors' bid procedures motion under the correct statutory interpretation.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 11-166

In the Supreme Court of the United States

RADLAX GATEWAY HOTEL, LLC, ET AL.,
PETITIONERS

v.

AMALGAMATED BANK

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Section 1129(b)(2)(A) of the Bankruptcy Code permits a bankruptcy court to confirm a proposed Chapter 11 plan that impairs the rights of an objecting secured creditor if the plan, *inter alia*, is "fair and equitable." In order to satisfy that requirement, a plan must either: (i) allow secured creditors to retain their liens on collateral and receive cash payments of a specified value; (ii) provide for the sale of collateral free and clear of secured creditors' liens under conditions that allow the creditors to credit bid at the sale and retain liens on the sale proceeds; or (iii) give secured creditors the "indubitable equivalent" of their claims. The question presented is as follows:

Whether a Chapter 11 plan can be approved pursuant to Section 1129(b)(2)(A)(iii), on the ground that it affords an objecting secured creditor the "indubitable equivalent" of its claim, if it provides for the sale of collateral free and clear of the creditor's lien on the property, but does not permit the creditor to credit bid at the sale.

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INTEREST OF THE UNITED STATES

The question presented in this case concerns the right of secured creditors to "credit bid" at an auction sale of encumbered property held pursuant to a Chapter 11 bankruptcy plan. United States Trustees—who are Department of Justice officials appointed by the Attorney General—supervise the administration of Chapter 11 cases and trustees, monitor Chapter 11 plans, and file comments with bankruptcy courts regarding such plans in connection with confirmation hearings pursuant to 11 U.S.C. 1125, 1128. See 28 U.S.C. 586(a)(3)(B); H.R. Rep. No. 595, 95th Cong., 1st Sess. 88 (1977). "The United States trustee may raise and may appear and be heard on any issue in any [bankruptcy] case or proceed-

ing." 11 U.S.C. 307. In addition, the United States is frequently a secured creditor in bankruptcy. Because federal agencies often do not have sufficient appropriated funds to participate in a cash-only auction sale of an encumbered asset, the government's ability to credit bid the allowed amount of its claim at any collateral sale is critical to its ability to enforce its security interests in bankruptcy. For these reasons, the United States has a substantial interest in the Court's resolution of the question presented in this case.

STATEMENT

1. a. Chapter 11 of the Bankruptcy Code provides for the reorganization of financial obligations of a business enterprise or individual. 11 U.S.C. 1101 *et seq.* When a bankruptcy petition is filed, any creditor may submit a proof of claim or interest with the bankruptcy court. 11 U.S.C. 501. The court then determines which claims are "allowed" and to what extent. 11 U.S.C. 502.

This case involves a claim that is secured by property of the debtor. Where, as here, a creditor's claim is undersecured (*i.e.*, the current value of the collateral securing a debt is less than the amount of the claim), the claim may be bifurcated into a secured claim for the current value of the collateral and an unsecured claim for the balance (the deficiency). 11 U.S.C. 506. Alternatively, if the creditor (or class of creditors) so elects, an undersecured claim may be treated as fully secured (*i.e.*, as secured for the full amount of the claim rather than for the current value of the collateral). 11 U.S.C. 1111(b)(2). That election is not available, however, if the claim is of inconsequential value or the property is sold pursuant to Section 363 or through the plan. 11 U.S.C. 1111(b)(1)(B).

Chapter 11 bankruptcies are implemented according to a "plan" (usually, but not always, filed by the debtor, 11 U.S.C. 1121) that assigns to "classes" the various allowed claims against it and specifies the treatment each class of claims shall receive under the plan. 11 U.S.C. 1122, 1123. Each secured creditor typically is designated as a class unto itself. See 7 *Collier on Bankruptcy* ¶ 1122.03[3][c] at 1122-15 (Alan N. Resnik & Henry J. Sommer eds., 16th ed. 2011) (*Collier*). A proposed plan must provide "adequate means for the plan's implementation," including by providing for the "sale of all or any part of the property of the estate, either subject to or free of any lien." 11 U.S.C. 1123(a)(5)(D).

A court generally may confirm a proposed Chapter 11 plan only if each class of creditors "has accepted the plan" or "is not impaired under the plan." 11 U.S.C. 1129(a)(8)(A) and (B); see 11 U.S.C. 1124. Section 1129(b) establishes an exception to that general rule, however, by authorizing a bankruptcy court, under specified circumstances, to confirm a proposed plan that impairs the claim or interest of a non-consenting creditor. Such a plan (commonly known as a "cramdown" plan) must satisfy all of Section 1129(a)'s conditions for confirmability other than the requirement that impaired classes of creditors consent. 11 U.S.C. 1129(b)(1). In addition, a cramdown plan must "not discriminate unfairly," and it must be "fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." *Ibid.*

Section 1129(b)(2) establishes the criteria for determining whether a cramdown plan is "fair and equitable with respect to a class." 11 U.S.C. 1129(b)(2). With respect to secured claims—the only type of claim at issue in this case—a cramdown plan must "provide[]":

> (i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and
>
> (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;
>
> (ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or
>
> (iii) for the realization by such holders of the indubitable equivalent of such claims.

11 U.S.C. 1129(b)(2)(A).

Under clause (i), a plan may be confirmed over a secured creditor's objection if the creditor retains its lien and the plan provides for deferred cash payments that total at least the allowed amount of the claim and have a present value (as of the date of plan confirmation) no less than the current value of the collateral. 11 U.S.C. 1129(b)(2)(A)(i). Under clause (ii), a plan that provides for the sale of collateral free and clear of the secured creditor's lien may be confirmed if the sale is conducted pursuant to 11 U.S.C. 363(k), the creditor retains a lien on the proceeds of the sale, and such lien receives treat-

ment as provided under either clause (i) or clause (iii). 11 U.S.C. 1129(b)(2)(A)(ii). Section 363(k) provides that, when "property that is subject to a lien that secures an allowed claim" is sold at auction, "the holder of such claim may bid at such sale * * * [and] may offset such claim against the purchase price of such property," "unless the court for cause orders otherwise." 11 U.S.C. 363(k). That auction practice, through which a secured creditor may bid on encumbered property without providing cash, is commonly known as "credit bidding." Finally, under clause (iii), a plan may be confirmed if it provides for the "realization" by the objecting secured creditor "of the indubitable equivalent" of its claim. 11 U.S.C. 1129(b)(2)(A)(iii).

2. a. In 2007, petitioners purchased the property known as the Radisson Hotel at Los Angeles International Airport, with the intent of renovating the hotel and building a parking structure on a related parcel. Pet. App. 3a-4a. In order to finance the purchase of the hotel and the planned renovation and construction, petitioners secured loans totaling approximately $142 million from the Longview Ultra Construction Loan Investment Fund, which loans were to be administered by respondent Amalgamated Bank. *Id.* at 4a. Petitioners ran out of funds during the construction of the parking structure and were unable to negotiate the loan of additional money from respondent. *Ibid.* Petitioners subsequently filed a voluntary Chapter 11 bankruptcy petition. *Id.* at 4a-5a.

When the petition was filed, petitioners owed at least $120 million on the loans, which were accruing more than $1 million in interest every month. Pet. App. 5a. In addition, more than $15 million in mechanics' liens have been asserted against petitioners' properties.

Ibid. Petitioners continue to operate their businesses as debtors in possession pursuant to 11 U.S.C. 1107 and 1108. Pet App. 5a.

b. In June 2010, petitioners submitted a proposed reorganization plan to the bankruptcy court. Pet. App. 5a; J.A. 14-96. The plan proposed to dissolve petitioners and to sell "substantially all of [petitioners'] assets" at auction in accordance with procedures set out in a contemporaneously filed "Sale and Bid Procedures Motion." J.A. 65-66. The plan further proposed that the proceeds of the sale would be transferred to respondent in full satisfaction of its claim. *Id.* at 66.

The bid procedures motion explained that petitioners had arranged for a "stalking horse" bidder (LAX Century & Sepulveda Hotel, LLC) that had agreed to bid $47.5 million at auction for "substantially all of [petitioners'] assets," *i.e.*, the hotel and parking structure. J.A. 105-106. One of petitioners' principals was expected to own an equity stake in the stalking horse. J.A. 105. The motion explained that the stalking horse had agreed to leave current management of the hotel and garage in place after the auction, and to contribute 20% of the profits earned after the sale to petitioners' liquidating trust (less a 12% return on the purchaser's investment), with 75% of that amount (*i.e.*, 15% of profits) to be distributed to petitioners' unsecured creditors and the remaining 25% to respondent. J.A. 39, 105, 108. Petitioners proposed that interested buyers bid in cash, deposit 5% of any bid into an escrow account, and identify both the proposed management company for the property and the future brand name of the hotel. J.A. 110-114. Petitioners also proposed that the stalking horse receive approximately $1.5 million if it was not the successful bidder, and that any competing bidder be required to

outbid the stalking horse by at least that amount in order to win at the auction. J.A. 117-118.

Petitioners' proposed bid procedures specifically barred any holder of a lien on petitioners' assets from "credit bid[ding] pursuant to section 363(k) of the Bankruptcy Code." J.A. 118. Respondent objected to that aspect of the proposed bid procedures. See Pet. App. 6a, 38a-39a, 41a-42a. Petitioners argued that preclusion of credit bidding was permissible under the Bankruptcy Code because secured creditors do not have a right to credit bid when a cramdown plan offers them the "indubitable equivalent" of their secured claims pursuant to Section 1129(b)(2)(A)(iii). J.A. 126-129. Petitioners further contended, in the alternative, that there was "cause" under Section 363(k) to suspend any right to credit bid. J.A. 129-132.

The bankruptcy court denied petitioners' motion to approve their proposed auction procedures. Pet. App. 38a-39a. The court concluded that the procedures did not comply with Section 1129(b)(2)(A)'s requirements for confirmation of a cramdown plan, *id.* at 42a, and that petitioners had not established "cause" for precluding credit bidding, *id.* at 43a-45a. At petitioners' request, the bankruptcy court certified for direct review in the court of appeals the question presented in this case. *Id.* at 30a-37a. The court of appeals authorized the appeal. J.A. 163-164.

c. The court of appeals affirmed. Pet. App. 1a-26a. The court sustained the bankruptcy court's determination that Section 1129(b)(2)(A) does not permit a debtor to sell an encumbered asset free and clear of liens without permitting the lienholders to credit bid. *Id.* at 10a-26a. The court explained that the Bankruptcy Code recognizes two basic methods of determining the market

value of assets to be sold in a corporate bankruptcy: "judicial valuation of an asset's value, 11 U.S.C. § 506(a)(1), and free market valuation of an asset's value as established in an open auction, 11 U.S.C. §§ 363(k), 1129(b)(2)(A)." *Id.* at 19a. The court further explained that, by affording secured creditors the right to credit bid at auctions conducted under Sections 363(k) and 1129(b)(2)(A)(ii), "the Code provides lenders with means to protect themselves from the risk that the winning auction bid will not capture the asset's actual value." *Ibid.*

The court of appeals concluded that petitioners' reading of Section 1129(b)(2)(A)(iii) was "unacceptable" because petitioners' approach "would render the other subsections of the statute superfluous." Pet. App. 23a. The court explained that "[a]llowing plans to use Subsection (iii) to accomplish a sale free of liens without according lenders the procedural protections prescribed by clause (ii) 'places the two clauses in conflict' and would allow the general to subsume the specific." *Id.* at 23a n.7 (quoting *In re Philadelphia Newspapers, LLC*, 599 F.3d 298, 329 (3d Cir. 2010) (Ambro, J., dissenting)). The court also observed that, although the Bankruptcy Code affords secured creditors various means to protect their interests in different factual circumstances, *id.* at 24a-25a, "the Code does not appear to contain any provisions that recognize an auction sale where credit bidding is unavailable as a legitimate way to dispose of encumbered assets," *id.* at 25a.

SUMMARY OF ARGUMENT

A. When a Chapter 11 debtor proposes a plan that would impair the rights of a secured creditor, the debtor must either obtain the creditor's consent or comply with

the requirements of Section 1129(b), which governs "cramdown" plans. Section 1129(b) requires that a cramdown plan be "fair and equitable" with respect to every creditor class whose claim is impaired, and Section 1129(b)(2)(A) specifies three means by which that requirement may be satisfied when a secured creditor objects to plan confirmation. Clause (i) of Section 1129(b)(2)(A) allows a plan to be confirmed over a secured creditor's objection if the creditor retains its lien and is promised deferred cash payments satisfying specified criteria. Clause (ii), which applies when the plan would sell collateral free and clear of a lien, requires, *inter alia*, that the lienholder be permitted to credit bid at the auction. Finally, clause (iii) authorizes confirmation of a plan that provides an objecting secured creditor "the indubitable equivalent" of its claim.

As the court of appeals recognized, the clause (iii) catch-all should not be applied in a way that undermines or renders superfluous the more specific provisions of clauses (i) and (ii). A deferred stream of cash payments that does not satisfy clause (i), for example, could not properly be considered a "fair and equitable" treatment of an objecting creditor's claim under the "indubitable equivalent" standard of clause (iii). Clause (iii) likewise does not authorize the confirmation of a plan that proposes to sell plan assets free and clear of existing liens unless secured creditors are allowed to exercise the right to credit bid that is conferred by clause (ii).

B. The Bankruptcy Code's general treatment of secured creditors confirms that petitioners may not extinguish respondent's lien on collateral by selling the property through an auction at which respondent is not permitted to credit bid. Taken together, Sections 363(k), 1111(b), and 1129(b)(2)(A) establish that a secured credi-

tor is entitled *either* to have the full amount of its claim treated as secured (rather than just the amount corresponding to the current value of the collateral) *or* to bid the allowed amount of its claim at any sale of the collateral that would extinguish the creditor's lien. That system prevents debtors from cashing out secured creditors when the actual or perceived value of collateral is depressed.

If the debtor retains the encumbered property, a creditor may elect under Section 1111(b) to have the full allowed amount of its claim treated as secured. Such an election is not available when the property is sold under the plan; but in those cases a creditor may guard against undervaluation by bidding the full allowed amount of its claim at any auction that would sell the property free of liens. The creditor is thereby guaranteed either to take the property (if it wins at auction) or to be paid at least the value that it places on the property (if it is outbid at auction) in the form of the proceeds of the sale.

C. Petitioners' interpretation of Section 1129(b)(2)(A) also takes insufficient account of the legal background against which that provision was enacted. The longstanding rule outside of bankruptcy was that a mortgage holder could not be compelled to relinquish its lien on collateral unless it had been paid in full or was permitted to bid at a foreclosure sale. The traditional practice within bankruptcy was similar—a plan could not reduce the amount of a secured creditor's lien over the creditor's objection except by paying the debt. Under petitioners' expansive view of Section 1129(b)(2)(A)(iii), however, an objecting secured creditor could be divested of its lien while receiving less than its own valuation of the property. The general language of Section 1129(b)(2)(A)(iii) should not be construed to ef-

fect so severe an impairment of the rights of secured creditors.

D. A creditor's opportunity to bid cash at an asset sale is not an adequate substitute for the right to bid credit. Cash bids include transaction costs not associated with bidding credit. And some secured creditors—such as the United States and federal agencies—are significantly constrained in their ability to bid cash.

ARGUMENT

IN THE ABSENCE OF GOOD CAUSE, A CHAPTER 11 BANKRUPTCY PLAN MAY NOT SELL ENCUMBERED PROPERTY FREE AND CLEAR OF THE LIEN OF A NON-CONSENTING SECURED CREDITOR WITHOUT PERMITTING THE CREDITOR TO CREDIT BID AT THE SALE OF THE PROPERTY

Under Section 1129(b)(2)(A), a proposed reorganization plan may be confirmed over a secured creditor's objection only if one of three conditions is satisfied. Under clause (ii) of that provision, plan confirmation may be premised on an auction sale of the collateral, free and clear of the secured creditor's lien, so long as the secured creditor is allowed to credit bid and obtains a lien on the sale proceeds. The question presented in this case is whether plan confirmation under clause (iii) may be premised on an otherwise comparable auction sale at which credit bidding is *not* permitted. The text, structure, and history of Section 1129(b)(2)(A), and of the Bankruptcy Code more broadly, make clear that clause (iii) may not be utilized in that manner.

A. The Text And Structure Of Section 1129 Demonstrate That, In The Absence Of Good Cause, Any Cramdown Chapter 11 Plan That Proposes To Sell An Encumbered Asset Free And Clear Of Liens Must Permit A Lienholder To Credit Bid At The Sale

1. Each of Section 1129(b)(2)(A)'s three clauses establishes a different means of ensuring that a cramdown plan is "fair and equitable" to an objecting secured creditor. Clause (i) authorizes confirmation when the secured creditor retains its lien on the property and the plan entitles the creditor to a stream of deferred cash payments satisfying specified prerequisites. 11 U.S.C. 1129(b)(2)(A)(i). Clause (ii) applies when the encumbered property is sold free and clear of liens and the plan allows the creditor to credit bid the allowed amount of its claim. 11 U.S.C. 1129(b)(2)(A)(ii); see 11 U.S.C. 363(k). Clause (iii) is a catch-all that applies when the plan provides secured creditors "the indubitable equivalent of [their] claims." 11 U.S.C. 1129(b)(2)(A)(iii). The phrase "indubitable equivalent," which Congress apparently borrowed from Judge Learned Hand's opinion for the Second Circuit in *In re Murel Holding Corp.*, 75 F.2d 941, 942 (1935), has been understood to encompass situations in which the secured creditor receives either the collateral itself or a lien on substitute collateral. See Kenneth N. Klee, *All You Ever Wanted to Know About Cram Down Under the New Bankruptcy Code*, 53 Am. Bankr. L.J. 133, 156 (1979) (Klee).[1]

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[1] Professor Klee "served as associate counsel to the Committee on the Judiciary, U.S. House of Representatives," and was "one of the principal drafters of the Bankruptcy Code." *In re Philadelphia Newspapers, LLC*, 599 F.3d 298, 331 n.16 (3d Cir. 2010) (Ambro, J., dissenting).

Clause (iii) of Section 1129(b)(2)(A) would serve no useful purpose unless it covered at least some plan provisions that fall outside clauses (i) and (ii). To that extent, petitioners are correct in arguing (Br. 15-18) that a plan may be "fair and equitable" under clause (iii) even though neither clause (i) nor clause (ii) applies. It does not follow, however, that a court may effectively override Congress's detailed determination of what constitutes "fair and equitable" treatment of a secured creditor's claim in situations covered by clauses (i) and (ii) by invoking the "indubitable equivalent" standard of clause (iii). Rather, clause (iii) should be construed so as not to undermine or render superfluous those more specific provisions.

2. Clause (i) establishes one set of criteria that, if satisfied, will render the plan fair and equitable with respect to a particular objecting secured creditor. First, the objecting creditor must retain its lien on the property in the allowed amount of its claim, even if the property is transferred to another entity. 11 U.S.C. 1129(b)(2)(A)(i)(I). Second, the plan must provide for deferred cash payments "totaling at least the allowed amount of such claim," and the present value of the payment stream must be at least as great as the creditor's interest in the property. 11 U.S.C. 1129(b)(2)(A)(i)(II).[2]

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[2] The allowed amount of a secured creditor's claim (and thus the amounts of the liens and deferred cash payments required to satisfy clause (i)) will depend on whether the creditor has made the election authorized by Section 1111(b)(2). For example, if an objecting creditor has a lien of $100,000 secured by property worth $50,000, and the debtor seeks plan confirmation under clause (i), the surviving lien must be in the amount of $100,000 for electing creditors or $50,000 for non-electing creditors. In addition, the plan must ensure that the creditor will receive deferred cash payments with a present value of $50,000

The careful balancing of interests reflected in clause (i) would be significantly undermined if some subset of those protections—such as retention of the creditor's lien and deferred cash payments totaling 90% of the allowed amount of the creditor's claim, or a stream of deferred payments *without* retention of the creditor's lien—could be considered "fair and equitable" treatment of an objecting creditor's claim under the "indubitable equivalent" standard of clause (iii).

The requirements of clause (ii) are similarly detailed. That provision specifies that a sale of property free of liens must be conducted pursuant to Section 363(k), which in turn requires that a lienholder be permitted to credit bid up to the full allowed amount of its claim. 11 U.S.C. 363(k), 1129(b)(2)(A)(ii); see *In re SubMicron Sys. Corp.*, 432 F.3d 448, 459 (3d Cir. 2006). Clause (ii) also requires both that the creditor take a lien on any proceeds of the sale and that the plan treat such lien in a matter that complies with either clause (i) or clause (iii). Congress thereby provided an objecting creditor with a procedural protection—the right to credit bid—designed to guard against undervaluation of collateral through either an insider sale or a judicial valuation. Clause (ii) is properly understood to reflect Congress's focused judgment concerning the circumstances under which a sale of encumbered property free and clear of existing liens may be deemed by a bankruptcy court to be "fair and equitable" to an objecting secured creditor.

(regardless of whether the creditor has elected to treat the entire amount as secured under Section 1111(b)(2)), and that the total amount of such payments is at least as great as the allowed amount of the claim ($100,000 for an electing creditor or $50,000 for a non-electing creditor).

In this case, petitioners proposed to sell the Radisson Hotel at Los Angeles International Airport free and clear of respondent's existing lien, and to compensate respondent exclusively from the sale proceeds. Petitioners' proposed bid procedures, however, specifically *precluded* respondent from exercising the right to credit bid that clause (ii) (through its cross-reference to Section 363(k)) guarantees. Treating the proposed auction as a "fair and equitable" treatment of respondent's claim under clause (iii)'s "indubitable equivalent" standard would subvert the balance drawn in clause (ii) by allowing petitioners to deprive respondent of the valuation protection afforded by credit bidding.

3. As this Court recently reaffirmed, "[g]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment." *Bloate* v. *United States*, 130 S. Ct. 1345, 1354 (2010) (quoting *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U.S. 204, 208 (1932) (applying this principle to the Bankruptcy Act of 1898)). Contrary to petitioners' contention (Br. 31), that principle is not rendered inapplicable simply because clause (ii) "is not a limiting subset of [clause] (iii)." Indeed, this Court has repeatedly found that a specific statutory provision trumps a more general one even when the two provisions are included in entirely different statutes. See, *e.g.*, *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 170 (2007); *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384-385 (1992); *Simpson* v. *United States*, 435 U.S. 6, 15 (1978).

Petitioners also argue (Br. 29-30) that neither clause (ii) nor clause (iii) "is more specific or more general than the other." Clause (ii), petitioners contend, provides a creditor with the "*procedural* protection" of entitlement

to credit bid, while clause (iii) provides it with the "*substantive* protection" of receiving the indubitable equivalent of its secured claim. *Ibid.* That is incorrect.

Unlike clause (iii), clause (ii) specifically addresses situations in which encumbered property is sold free and clear of existing liens. Clause (ii) provides that the proceeds of such sales will constitute adequate compensation to objecting secured creditors only if the sales are conducted in accordance with Section 363(k), which guarantees the right to credit bid. Petitioners seek to undo that congressional judgment by proposing a Chapter 11 plan that is a clause (ii) plan in every respect but one: petitioners propose to sell the collateral, extinguish the liens, and give the sale proceeds to the secured creditor in full satisfaction of its claim, but refuse to respect respondent's presumptive right to credit bid. As Judge Ambro noted in his dissenting opinion in *In re Philadelphia Newspapers, LLC*, 599 F.3d 298, 329 (3d Cir. 2010), it "seems Pickwickian to believe that Congress would expend the ink and energy detailing procedures in clause (ii) that specifically deal with plan sales of property free of liens, only to leave general language in clause (iii) that could sidestep entirely those very procedures."

The opportunity to credit bid protects secured creditors against the risk that the high bid at auction will be less than the property's true worth. See Pet. App. 19a (explaining that, by affording secured creditors the right to credit bid, Sections 363(k) and 1129(a)(2)(B)(ii) "provide[] lenders with means to protect themselves from the risk that the winning auction bid will not capture the asset's actual value"); pp. 18-22, *infra*. Petitioners, by contrast, propose a *different* procedural mechanism—a comparison by the bankruptcy court between the auc-

tion price and the asset's actual value, see Pet. Br. 44-45—to protect secured creditors against that same risk, and thus to ensure "fair and equitable" treatment of secured creditors' claims. Treating a judicially-approved sale price as the "indubitable equivalent" of respondent's claim would subvert the congressional balancing of interests reflected in clause (ii).

To be sure, as petitioners observe (Br. 18-19), clause (iii) does not *expressly* negate the possibility that the proceeds of a no-credit-bidding asset sale could constitute the "indubitable equivalent" of a secured creditor's claim. But the whole point of the canon that specific statutory language controls over general is to address situations in which the general provision at least arguably covers the situation before the court. See *Bloate*, 130 S. Ct. at 1354 ("[G]eneral language of a statutory provision, *although broad enough to include it*, will not be held to apply to a matter specifically dealt with in another part of the same enactment.") (citation omitted) (emphasis added). The canon would serve no useful purpose if it were rendered inapplicable by Congress's failure to enact an explicit exception to the general provision.

It would be particularly inappropriate to interpret clause (iii) in the manner petitioners advocate because clause (ii) directs that, when an encumbered asset is sold free and clear of a secured creditor's lien, the lien attaches to the proceeds of the asset sale, and the plan must provide for the transferred lien to be treated according to the requirements of either clause (i) or clause (iii). The statute thereby specifies the role that clause (iii) plays in determining whether a sale of assets free and clear of liens is "fair and equitable" to an objecting secured creditor. A debtor may extinguish a creditor's

lien on the proceeds of an asset sale by offering the creditor the indubitable equivalent of that lien. But the value of the lien (*i.e.*, the value of the sale proceeds) must be determined by a sale that is conducted according to the requirements of Section 363(k).

Petitioners may not prevent respondent from invoking the valuation protection of credit bidding by substituting an after-the-fact judicial approval of a sale price. The point of giving a creditor the presumptive right to credit bid is to give the creditor a means of protecting against the undervaluation of property securing its claim. If a creditor believes collateral is worth more than what would otherwise be the winning bid amount, the creditor may bid more than that amount (in credit) and either take the collateral or drive up the amount of the winning bid and take those proceeds. Under petitioners' view, the only protection against undervaluation of collateral would be judicial review of a completed sale at which the price was set without the creditor's ability to credit bid. Because such a scheme would deprive the creditor of the right either to take collateral or to take what it views as the collateral's value, it would not, in Congress's determination, constitute "fair and equitable" treatment of the secured creditor's claim.

B. The Bankruptcy Code's Other Protections For Secured Creditors Confirm That A Secured Creditor Has The Presumptive Right To Credit Bid When A Cramdown Plan Proposes To Sell Its Collateral Free And Clear Of Liens

Related provisions of the Bankruptcy Code confirm that, when encumbered property is sold free and clear of existing liens, at a sale at which credit bidding is not allowed, giving an objecting creditor a lien on the sale

proceeds cannot constitute "fair and equitable" treatment of the creditor's claim under Section 1129(b)(2)(A)(iii)'s "indubitable equivalent" standard. See *Dolan* v. *USPS*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute."); *Ali* v. *BOP*, 552 U.S. 214, 222 (2008) (noting that judicial construction of a statutory term "must, to the extent possible, ensure that the statutory scheme is coherent and consistent"); *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) (same). In particular, it is apparent from Section 1129(b)(2)(A)'s interaction with Sections 363(k) and 1111(b) that Congress intended to protect the rights that secured creditors bargained for by preventing debtors from "cashing out" creditors when the (actual or perceived) value of collateral is at a low point. See Klee 161.

1. Section 363(k) governs the sale of "property that is subject to a lien that secures an allowed claim." 11 U.S.C. 363(k). That provision states that, in the absence of "cause," a lienholder "may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property." *Ibid.* As petitioners note (Br. 26), a creditor's right to credit bid under Section 363(k) includes the right to bid up to the full value of its allowed claim. See *In re SubMicron Sys. Corp.*, 432 F.3d at 459 ("It is well settled among district and bankruptcy courts that creditors can bid the full face value of their secured claims under § 363(k).").

The right to credit bid ensures that, when an encumbered asset of the bankruptcy estate is sold free and clear of existing liens, a secured creditor will receive at

least the value that it places on the collateral, either in the form of the collateral itself (if it submits the winning bid), or in the form of sale proceeds equal to or greater than the amount the creditor is willing to bid for the property (if a competing bidder submits a higher bid). By exercising its right to credit bid the full allowed amount of its claim, a secured creditor can ensure that it either will be paid in full (if another bid is higher) or will acquire ownership of the property. That right protects the creditor against the risk that the auction price (and thus the compensation the creditor receives for its allowed claim) will be lower than the asset's true value. As the court of appeals explained, "[i]f a secured lender feels that the bids that have been submitted in an auction do not accurately reflect the true value of the asset and that a sale at the highest bid price would leave them undercompensated, then they may use their credit to trump the existing bids and take possession of the asset." Pet. App. 19a.

Section 1111(b), which was added to the Code at the same time as Section 1129(b), similarly ensures that a secured creditor will not be forced to relinquish its lien on collateral in exchange for a monetary payment less than the allowed amount of its claim. As explained above (see p. 2, *supra*), an undersecured creditor may elect under Section 1111(b) to have the entire allowed amount of its claim treated as a secured claim rather than having the claim bifurcated into a secured claim for the value of the collateral and an unsecured deficiency claim for the balance. 11 U.S.C. 1111(b); see 11 U.S.C. 506(a)(1). Although such an election will deprive the creditor of the right to vote its deficiency claim along with other unsecured creditors in proceedings to approve or object to a proposed plan, the option of making

the Section 1111(b)(2) election allows the creditor to retain its lien on the collateral if it believes the property is being undervalued in the bankruptcy process. See *Collier* ¶ 1111.03[2][a] at 1111-22, ¶ 1111.03[3][c] at 1111-26. As the leading treatise explains, this election can be used "to prevent an attempted cash out," whereby a debtor pays an understated assessed value of an asset to a secured creditor (because such creditor's allowed secured claim is set by Section 506 at the value of the collateral), extinguishes the lien, exits bankruptcy, and then retains the asset's appreciation for itself. *Id.* ¶ 1111.03[3][c] at 1111-26; see *id.* ¶ 1111.03 at 1111-14 ("[S]ection 1111(b) protects the legitimate expectation of secured lenders that the bankruptcy laws will be used only as a shield to protect debtors and not as a sword to enrich debtors at the expense of secured creditors.").

The Section 1111(b) election is not available if the asset in question "is sold under section 363 of this title or is to be sold under the plan." 11 U.S.C. 1111(b)(1)(B)(ii). Sections 363(k) and 1111(b) therefore function as alternative means of protecting an undersecured creditor from being cashed out at a depressed value. If encumbered property is to be sold, the creditor has the presumptive right to credit bid, thereby ensuring that it receives either the property or a monetary amount that reflects the creditor's own valuation of the asset. If encumbered property is not sold, the creditor may elect to have its claim treated as fully secured, thereby ensuring that it may share in any increase in the property's value, up to the amount of its claim, and that it may foreclose in the event of future default. See *Collier* ¶ 1111.03[2][b] at 1111-23, ¶ 1111.03[3][b] at 1111-25 to 1111-26; see also *In re Kent Terminal Corp.*, 166 B.R.

555, 562-567 (Bankr. S.D.N.Y. 1994) (explaining that a secured creditor must either be able to take advantage of Section 1111 or be able to credit bid at a collateral sale); *In re 222 Liberty Assocs.*, 108 B.R. 971, 977-980 (Bankr. E.D. Pa. 1990) (same). Taken together, these provisions afford secured creditors substantial protection against judicial undervaluation of encumbered assets. See *In re Woodridge N. Apts., Ltd.*, 71 B.R. 189, 191-192 (Bankr. N.D. Cal. 1987); cf. *Bank of Am. Nat'l Trust & Savs. Ass'n* v. *203 N. LaSalle St. P'ship*, 526 U.S. 434, 457 (1999) (explaining that "the best way to determine value is exposure to a market," and that"one of the Code's innovations [was] to narrow the occasions for courts to make valuation judgments"). *Ibid.*

To construe Section 1129(b)(2)(A)(iii) as petitioners urge would subvert that carefully constructed framework by allowing an objecting undersecured creditor to be deprived of both the right to make a Section 1111(b) election *and* the right to credit bid. But the reason a creditor is not permitted to make an election under Section 1111(b) when a plan proposes to sell the property securing its claim is that the creditor has the right to credit bid the full amount of its claim at any sale of collateral. See 124 Cong. Rec. 32,407 (1978) (Rep. Edwards) ("Sale of property under section 363 or under the plan is excluded from treatment under section 1111(b) because of the secured party's right to bid in the full amount of his allowed claim at any sale of collateral under section 363(k)."); *Chapter 11 Reorganizations* § 14:19, at 954 (Hon. W. Homer Drake, Jr. & Christopher S. Strickland, eds., 2d ed. 2011-2012) (noting that any cramdown "sale free and clear of liens must comport with Bankruptcy Code section 363(k), thereby ensuring the secured creditor's right to challenge objection-

able sale terms"); Klee 155 & n.143 (same). Section 1129(b)(2)(A)(ii) makes that right express by incorporating Section 363(k)'s guarantee of the right to credit bid.

Petitioners contend (Br. 24-28) that the Bankruptcy Code protects a secured creditor's claim only to the extent of the value of the collateral at the time of the bankruptcy. That assertion is inconsistent with the default rule of bifurcated claims (which gives the secured creditor an unsecured claim over and above the present value of the asset)[3]; with the availability of the Section 1111(b) election (which gives the creditor a secured claim for more than the present value of the asset if the asset is not sold); and with the fact that Section 363(k) permits a secured creditor to bid the entire allowed amount of its claim (rather than simply the current value of the asset). In any event, Congress gave secured creditors the right to credit bid at the sale of collateral precisely to ensure that the proceeds of the sale reflect the true value of the collateral at the time of the bankruptcy.

2. As petitioners point out (Br. 35), the right to credit bid conferred by Section 363(k) is not absolute, since the right exists "unless the court for cause orders otherwise." 11 U.S.C. 363(k). Petitioners acknowledge (Br. 35), however, that the for-cause exception in Section 363(k) is generally invoked only in cases of creditor malfeasance or when a creditor's lien is in dispute. See, *e.g.*, *In re Daufuskie Island Props., LLC*, 441 B.R. 60, 64

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[3] Petitioners suggest (Br. 27) that Section 1111(b)(1) adequately protects the undersecured portion of a secured creditor's claim when the creditor does not have recourse against the debtor for the deficiency claim by treating such deficiency claim as an allowed unsecured claim even when the collateral is sold through the plan. By its terms, however, Section 1111(b)(1) does not apply when the collateral "is to be sold under the plan." 11 U.S.C. 1111(b)(1)(A)(ii).

(Bankr. D.S.C. 2010) (creditor not entitled to credit bid when mortgage was in dispute); *In re Theroux*, 169 B.R. 498 (Bankr. D.R.I. 1994) (barring credit bid where there was evidence of a collusive scheme to deprive state authorities of taxes). Petitioners sought to invoke the exception here, but they were "unable to demonstrate cause." Pet. Br. 35. By requiring that an asset sale under clause (ii) be conducted "subject to section 363(k)," 11 U.S.C. 1129(b)(2)(A)(ii), Congress signaled its intent that credit bidding be permitted under a cramdown plan unless the narrow for-cause exception applies. Confirmation of a cramdown plan that disallows credit bidding even in the absence of good cause would subvert that congressional choice.

Petitioners' reliance (Br. 21-22) on Sections 363(*l*) and 1123(a)(5)(D) is likewise misplaced. Those provisions authorize sales of estate property pursuant to Chapter 11 plans, and they do not refer to credit bidding. Petitioners describe those provisions as "compelling evidence that Congress did not intend to provide secured creditors with a right to credit bid in *all* chapter 11 cases." Br. 22. The question in this case, however, is not whether a no-credit-bidding asset sale can *ever* be held in a Chapter 11 case, but whether it can be held *over a secured creditor's objection*. Unlike Sections 363(*l*) and 1123(a)(5)(D), Section 1129(b)(2)(A)(ii) deals specifically with asset sales under cramdown plans, and it incorporates by reference the requirements of Section 363(k).

3. Petitioners also contend (Br. 39-41) that the court of appeals should not even have considered the requirements of Section 1129(b)(2)(A) when reviewing the bankruptcy court's rejection of petitioners' proposed auction procedures. Petitioners suggest that the courts below

should instead have allowed the proposed auction to take place, while deferring until a later date the decision whether to confirm petitioners' Chapter 11 plan. That argument is not fairly encompassed by the question on which this Court granted certiorari (which involves the proper construction of Code provisions that govern plan confirmation), and it lacks merit in any event.

Petitioners filed their Chapter 11 plan and their motion to establish bid procedures together, and each proposal was plainly made in contemplation of the other. Petitioners' plan specifically requests that "[t]he Confirmation Order shall grant the relief requested in the Sale and Bid Procedures Motion and authorize a sale of certain or substantially all of [petitioners'] assets * * * under the terms and conditions of the Asset Purchase Agreement," which agreement forms the basis of the proposed bid procedures. J.A. 65-66; see J.A. 105-109. The chapter 11 plan also specifies that respondent shall receive the proceeds of the proposed sale "in full satisfaction" of respondent's claim, J.A. 52-53, and it incorporates the profit-distribution scheme suggested in the bid proposal, J.A. 58-59. There is consequently no basis for petitioners' contention that their proposed bid procedures should have been evaluated without reference to Section 1129's requirements for plan confirmation.

C. Petitioners' Approach Takes Insufficient Account Of The Historical Context Against Which Congress Enacted The Bankruptcy Code

"When Congress amends the bankruptcy laws, it does not write on a clean slate." *Dewsnup* v. *Timm*, 502 U.S. 410, 419 (1992) (quoting *Emil* v. *Hanley*, 318 U.S. 515, 521 (1943)). Courts are therefore "reluctant to accept arguments that would interpret the Code * * * to

effect a major change in pre-Code practice" based on "vague" or "ambigu[ous]" language. *Id.* at 419-420. The text of Section 1129(b)(2)(A) gives no indication that Congress intended the substantial change from traditional bankruptcy practice that petitioners' approach would entail.

The longstanding rule outside of bankruptcy is that the holder of a mortgage may not be compelled to relinquish the collateral to the debtor free and clear of the lien unless either "the debt was paid in full" or the creditor "was allowed to bid at the judicial sale on foreclosure" in order "[t]o protect his right to full payment or the mortgaged property." *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 579-580 (1935). Within bankruptcy, the historical practice was not to permit "involuntary reduction of the amount of a creditor's lien for any reason other than payment on the debt." *Dewsnup*, 502 U.S. at 419; see *Farrey* v. *Sanderfoot*, 500 U.S. 291, 297 (1991) ("Ordinarily, liens and other secured interests survive bankruptcy"). Although the Bankruptcy Code does permit a court, through plan confirmation, to modify some rights of a secured creditor—by, for example, changing the length or schedule of payment terms under Section 1129(b)(2)(A)(i)—the Code largely preserves a secured creditor's essential right to insist upon either retaining its lien, being paid the full allowed amount of its claim, or taking the property.

The terms "fair and equitable" and "indubitable equivalent" should be construed in keeping with that statutory intent and structure. In proposing to sell encumbered property without permitting respondent to credit bid, and then to treat the sale proceeds as full satisfaction of their existing debt, petitioners are not

offering respondent the indubitable equivalent of its claim. They are instead offering respondent the cash equivalent of some third party's valuation of the collateral. Such a proposal is not "fair and equitable" to an objecting secured creditor because it abrogates the creditor's bargained-for rights in a manner not contemplated or permitted by the Bankruptcy Code. See Pet. App. 25a (court of appeals observes that "the Code does not appear to contain any provisions that recognize an auction sale where credit bidding is unavailable as a legitimate way to dispose of encumbered assets").

Petitioners suggest (Br. 44-45) that the "indubitable equivalent" standard may be satisfied by a judicial finding that the auction price reflects the fair market value of the encumbered property. See pp. 16-17, *supra*. The word "indubitable" clearly indicates, however, that clause (iii) applies only when equivalence is not subject to reasonable dispute. If a particular secured creditor prefers to accept a cash sum less than the full allowed amount of its claim, rather than to acquire ownership of the collateral, it can forgo its statutory right to credit bid (or can submit a bid less than the full allowed amount). The rights of a secured creditor, however, have traditionally included the right to insist on taking the collateral rather than accepting partial payment of the outstanding indebtedness. An approach that divests secured creditors of that right neither treats creditors' claims fairly and equitably nor provides them with the "indubitable equivalent" of their claims.[4]

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[4] There is particular reason to doubt whether an all-cash auction conducted on the terms proposed by petitioners could ever pay lenders the indubitable equivalent of their claims. The cost of financing a bid (five percent deposit and extensive due diligence, see J.A. 111-116), com-

D. The Right To Credit Bid Is An Essential Protection For Secured Creditors, Particularly For Lenders Such As The United States And Federal Agencies, Who Are Often Unable To Bid Cash

The right to bid cash at an asset sale is not a satisfactory substitute for a secured creditor's statutory right to credit bid. The transaction costs associated with bidding cash act as a disincentive to the submission of cash bids, and they reduce the likelihood that a secured creditor will regard an effort to acquire the property as economically preferable to acceptance of the auction proceeds. Petitioners' submission of proposed bid procedures that specifically precluded credit bidding, and their subsequent efforts to vindicate that approach in the court of appeals and in this Court, presumably reflect petitioners' understanding that their stalking horse bidder would be less likely to prevail at auction if respondent could credit bid the full amount of its claim. Requiring secured creditors to cash bid in these circumstances would also create the anomalous result that

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bined with the fact that the sale could not be consummated unless and until the plan is confirmed, would artificially depress bid amounts. See Vincent S.J. Buccola & Ashley C. Keller, *Credit Bidding and the Design of Bankruptcy Auctions*, 18 Geo. Mason L. Rev. 99, 121 (2010). Other features of the auction's structure similarly are not conducive to maximizing the proceeds of the sale. The plan would require a winning bidder to pay the stalking horse approximately $1.5 million, and to identify in its bid the management company it intends to put in place and the brand name under which it intends to operate the hotel. J.A. 111-118. The auction procedures appear to have been designed not to maximize the recovery for creditors, but to ensure that the stalking horse—a company that is expected to be owned in part by a current member of the management team and has promised to keep that management team in place—obtains possession of petitioners' assets.

rules of offset are intended to prevent, namely "the absurdity of making A pay B when B owes A." *Citizens Bank* v. *Strumpf*, 516 U.S. 16, 18 (1995) (quoting *Studley* v. *Boylston Nat'l Bank*, 229 U.S. 523, 528 (1913)). Section 363(k) avoids that result by providing that, if a secured creditor purchases at auction property subject to a lien that secures the creditor's allowed claim, the creditor "may offset such claim against the purchase price of such property." 11 U.S.C. 363(k).

In addition, specific classes of secured lenders—including the United States, which has loan guarantee portfolios in the billions of dollars—are particularly dependent on credit bidding because they face legal obstacles to cash bidding. The Anti-Deficiency Act, 31 U.S.C. 1341, forbids any officer or employee of the United States either to involve the "government in a contract or obligation for the payment of money before an appropriation is made" or to "authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. 1341(a)(1)(A) and (B). The ability of a federal agency to bid cash is therefore strictly circumscribed by the scope of its congressional appropriation. But because federal law also requires the United States to take a lien on collateral when it extends certain kinds of loans, the United States is often a secured creditor in bankruptcy proceedings. *E.g.*, 15 U.S.C. 636(a)(6) (requiring that loans by the Small Business Association "shall be of such sound value or so secured as reasonably to assure repayment"); 10 C.F.R. 609.10 (requiring the Department of Energy to take a security interest in collateral that is senior to other debt in exchange for providing loan guarantees to certain projects that employ innovative technologies). If the United States and federal agencies are

unable to bid cash at the sale of their collateral due to a lack of appropriated funds, and are prevented from exercising their statutory right to credit bid, the auction price of such assets would be depressed, and the United States would ultimately receive less value for its security interests.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 2012

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-166

IN THE

Supreme Court of the United States

RADLAX GATEWAY HOTEL, LLC and RADLAX GATEWAY DECK, LLC,
Petitioners,

—v.—

AMALGAMATED BANK,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN SUPPORT OF RESPONDENT FOR *AMICI CURIAE* PROFESSORS RICHARD AARON, LAURA BETH BARTELL, JAGDEEP S. BHANDARI, SUSAN BLOCK-LIEB, ROBERT D'AGOSTINO, JESSICA DAWN GABEL, KENNETH N. KLEE, GEORGE W. KUNEY, C. SCOTT PRYOR, NANCY B. RAPOPORT, MARIE T. REILLY, LYNNE F. RILEY, KEITH SHARFMAN, AND MICHAEL SOUSA

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INTEREST OF *AMICI*[1]

The Amici Curiae are law professors who have devoted their careers to the teaching and study of bankruptcy law.[2] They are keenly interested in this appeal because its outcome will have an impact on bankruptcy auction sales of property made free and clear of mortgages and other liens conducted pursuant to chapter 11 plans over the objection of a secured creditor, and on such creditor's ability to receive payment of the full debt owed to it or, failing that, to realize the true value of its collateral by means of credit bidding for the property.

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[1] Pursuant to Rule 37 of this Court, the *Amici* file this brief with the written consent of both parties, which is on file with the Clerk. No counsel for a party authored this brief in whole or in part. No person or entity including the *Amici* or their counsel made a monetary contribution for the preparation or submission of this brief.

[2] The *Amici* professors are Professor Richard Aaron, University of Utah-S. J. Quinney College of Law; Professor Laura Beth Bartell, Wayne State University Law School; Professor Jagdeep S. Bhandari, Florida Coastal College of Law; Professor Susan Block-Lieb, Fordham University School of Law; Professor Robert D'Agostino, John Marshall School of Law; Professor Jessica Dawn Gabel, Georgia State University College of Law; Professor Kenneth N. Klee, UCLA School of Law; Professor George W. Kuney, University of Tennessee College of Law; Professor C. Scott Pryor, Regent University School of Law; Professor Nancy B. Rapoport, William S. Boyd School of Law, University of Nevada, Las Vegas; Professor Marie T. Reilly, Penn State University-Dickinson School of Law; Professor Lynne F. Riley, Boston College Law School; Professor Keith Sharfman, St. John's University School of Law; and Professor Michael D. Sousa, University of Denver-Sturm College of Law.

By this *pro bono amicus* brief in support of Respondent, the *Amici* urge that, properly interpreted, 11 U.S.C. § 1129(b)(1) and § 1129(b)(2)(A)[3] require that if a secured creditor objects to confirmation of such chapter 11 plan, the secured creditor must be allowed to credit bid the debt for the plan to be confirmed.

The *Amici* represent no institution, group or association. Their sole purpose is to offer what assistance they can to this Court as it considers and decides this important bankruptcy law issue. They believe that their unique analysis of these provisions demonstrates that the most plausible interpretation of these provisions is that at a sale of an objecting secured creditor's collateral free and clear of its lien pursuant to a chapter 11 plan, the secured creditor must be allowed to credit bid.

SUMMARY OF ARGUMENT

The *Amici* seek affirmance of the order of the Court of Appeals for the Seventh Circuit. They urge that the Circuit Court correctly held that for a chapter 11 plan providing for the sale of a secured creditor's collateral free and clear of its mortgage to be confirmed over its objection as "fair and equitable" under § 1129(b)(1) of the Bankruptcy Code, the secured creditor must be allowed to credit bid and to set off the unpaid debt against the amount it bid to purchase the property. In the *Amici's* view, to confirm a chapter 11 plan providing for such a sale, it is required that

[3] References herein to numbered sections are to provisions of the Bankruptcy Code of 1978 codified by Title 11 of the United States Code.

the plan comply with § 1129(b)(2)(A)(ii), which, by incorporating § 363(k), accords a secured creditor the right to credit bid for its collateral. The *Amici* note that they urge affirmance based on a somewhat different statutory analysis of these provisions than that provided by the compelling analysis in Respondent's Brief filed with this Court and in the Seventh Circuit's opinion below.

It is well established under this Court's jurisprudence that a secured creditor's right to bid at a bankruptcy sale of its collateral constitutes a significant property right. *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 594 (1935). It is implausible to conclude that Congress intended to deprive a secured party of its property right to credit bid without any hint of an intention to do so, while specifically providing in § 363(k) for credit bidding at pre-confirmation sales of a secured creditor's collateral and at sales of collateral under chapter 11 plans pursuant to § 1129(b)(2)(A)(ii).

The *Amici* also argue that § 1129(b)(2)(A) should be interpreted to require that credit bidding be allowed in light of the practice established for two centuries to permit a secured creditor to credit bid in order to enable it to realize the true value of its collateral, instead of the amount of a lower cash bid for the property made by another person at an auction sale. Nowhere in the Bankruptcy Code of 1978 or its legislative history is there any indication that Congress intended to abolish this established practice. In that regard, under this Court's approach to statutory interpretation, it is not plausible to interpret a provision of the Bankruptcy Code as making a fundamental

change in prior practice in the absence of any mention by Congress of an intended change either in the relevant statute or its legislative history. Congress has not given the slightest hint of any intent to terminate the practice of allowing credit bidding.

It is further urged by the *Amici* that the Court should interpret § 1129(b)(2)(A) in accordance with Judge Learned Hand's approach in *In re Murel Holding Corp.*, 75 F.2d 941 (2d Cir. 1935). In *Murel*, Judge Hand set forth his understanding of the phrase "indubitable equivalence," which he coined. The legislative history of § 1129(b)(2)(A) makes clear that Congress intended the "indubitable equivalent" language of its clause (iii) to follow Judge Hand's "strict approach," but the opinion of one of the Circuit Courts that interpreted § 1129(b)(2)(A) did not cite *Murel*, and Judge Hand's concept of what would be an "indubitable equivalent" was not explored in the opinions of the other two Circuit Courts that have addressed the issue. In *Murel*, he explained, that for a plan to be confirmed over the objection of a secured creditor, it must fairly and equitably provide for the secured creditor "to get his money or at least the property," unless the creditor is given "a substitute of *the most* indubitable equivalence." *Id.* at 942 (emphasis added). In this regard, the *Amici* urge that this standard, requiring that a secured creditor be assured of receiving "the most" protection of its rights, cannot be satisfied without allowing credit bidding, because there is no equivalent that can be substituted for credit bidding. As explained by this Court, the purpose of credit bidding is to assure that the mortgaged property is devoted primarily to satisfaction of the debt

through the creditor's receipt of the proceeds of the sale or by taking the property itself. *Radford*, 295 U.S. at 594-595. Clause (iii) is thus unavailable for plan confirmation without allowing credit bidding, and it must be allowed at such sales in accordance with clause (ii).

In sum, it is not plausible to interpret § 1129(b)(1) and § 1129(b)(2)(A) as authorizing confirmation of a plan that provides for the sale of an objecting secured creditor's collateral without authorizing it to credit bid.

ARGUMENT

POINT I

WHERE A SECURED CREDITOR'S COLLATERAL IS TO BE SOLD UNDER A PLAN, THE MOST PLAUSIBLE INTERPRETATION OF § 1129(b)(2)(A) REQUIRES ALLOWING AN OBJECTING SECURED CREDITOR TO CREDIT BID THE DEBT OWED TO IT.

It is implausible, for two principal reasons, to interpret § 1129(b)(2)(A) as not requiring that an objecting secured creditor be allowed to credit bid where its collateral is to be sold under a plan free and clear of its lien. First, the right to credit bid is a property right of the secured creditor, which Congress gave no hint of an intention to terminate. Second, Congress does not write on a clean slate. It is implausible that when drafting § 1129(b)(2)(A), Congress would have intended to terminate the practice of credit bidding, which has

been an accepted practice by courts for nearly two centuries, without so indicating in the statute or its legislative history.

A. The most plausible interpretation of § 1129(b)(2)(A) requires that a secured creditor be allowed to credit bid because this Court has long recognized that its right to credit bid is a property right.

A secured creditor's right to credit bid at a sale of its collateral is a property right, which is among several substantive rights of a secured creditor in specific property. *Radford*, 295 U.S. at 589-590, 594-595. As early as 1821, the right of a secured creditor to bid up to the full amount of its outstanding debt and to apply it towards the auction price of its collateral, was an established component of the foreclosure sale process. *Nichols v. Ketchum*, 19 Johns 84, 92 (N.Y. Sup. Ct. 1821). In *Radford*, the Court explained the importance of credit bidding as the means "[t]o protect [the mortgagee's] right to full payment or the mortgaged property," *Radford*, 295 U.S. at 580, and that the mortgagee's right to protect its interest in the property by credit bidding is upheld "to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair competitive sale or by taking the property itself." *Id.* at 594-595.

This Court, in *Radford*, held the Frazier-Lemke Act, part of the former Bankruptcy Act, to be unconstitutional under the Fifth Amendment, noting that, except for the statute at issue in that case, it could not find a statute or decision requiring the secured creditor to give up its lien and

relinquish the property to the mortgagor "unless the debt was paid in full." *Id.* at 579. In holding the statute unconstitutional because of the taking of the mortgagee's several property rights, the Court stressed that a mortgagee has a right to full payment and recognized the importance of its property right to credit bid as the means to protect its right to full payment of the debt. *Id.* at 579-580. *See also Easton v. German-American Bank*, 127 U.S. 532, 538-539 (1888) (cited in *Radford*, 295 U.S. at 580 n.8) (expressly recognizing that a secured creditor's bid of its mortgage was as good, "in fact and law," as a payment of cash).

Congress addressed this constitutional defect by amending the Frazier-Lemke Act. This time, the Court, in *Wright v. Vinton Branch of Mountain Trust Bank of Roanoke, Va.*, 300 U.S. 440 (1937), sustained the Act as amended, rejecting a mortgagee's contention that the statute violated its right to due process under the Fifth Amendment. In sustaining the amended version, the Court pointed out that the new version adequately preserved three of the five rights of a mortgagee as enumerated by *Radford*, consisting of its right to retain its lien until payment of the debt, the right to realize on its collateral by a public sale, and the right to bid in the property at the public sale. *Wright*, 300 U.S. at 458-459 n.4. In upholding the amended Act, the Court noted that the original statute was held unconstitutional in *Radford* because of its impairment of the several property rights of a mortgagee, including the right to credit bid. However, in so holding, the Court made clear in *Wright* its understanding of the importance of the right to credit bid. The Court thus treated the

amended Act as though its terms provided for credit bidding even though the Act did not so state, and despite the fact that a provision of the bill providing for credit bidding did not make it into the statute as enacted. *Wright*, 300 U.S.at 459 and n. 4. The Court in *Wright* found that credit bidding was embedded in the statute by accepting the view, expressed in floor statements by Senators responsible for the bill in the legislative process, that secured creditors would have a right to bid in the property at a sale under the statute. *Id.* Thus, the Court interpreted the amended statute in light of Congress' intention to protect the mortgagee's right to credit bid, endorsing that intent.

Congress was surely aware of this Court's jurisprudence when writing § 1129(b). It is thus implausible to conclude that Congress intended to override the view expressed in the Court's jurisprudence that protects a mortgagee's right to credit bid.

B. The most plausible interpretation of § 1129(b)(2)(A) requires that a secured creditor be allowed to credit bid because credit bidding is a historically-accepted practice of which Congress was aware when drafting that provision.

For nearly two centuries and long before enactment of the present Bankruptcy Code, credit bidding has been recognized by the courts as an inherent ingredient of the foreclosure process. *See* Point I.A *supra*. Congress does not legislate on a clean slate when it amends the bankruptcy laws; rather, Congress is presumed to have been aware of longstanding practice, and legislates with that

in mind. As stated by this Court in *Dewsnup v. Timm*, 502 U.S. 410 (1992), provisions of the Bankruptcy Code are interpreted to continue an established prior practice, absent a clear contrary indication in the text of a statute or, at the very least, some discussion in the legislative history:

> When Congress amends the bankruptcy laws, it does not write "on a clean slate." *See Emil v. Hanley*, 318 U.S. 515, 521, 63 S.Ct. 687, 690-691, 87 L.Ed. 954 (1943). Furthermore, this Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history. Of course, where the language is unambiguous, silence in the legislative history cannot be controlling. But, given the ambiguity here, to attribute to Congress the intention to grant a debtor the broad new remedy against allowed claims to the extent that they become "unsecured" for purposes of § 506(a) without the new remedy's being mentioned somewhere in the Code itself or in the annals of Congress is not plausible, in our view, and is contrary to basic bankruptcy principles.

Dewsnup, 502 U.S. at 419-420 (citations omitted). *See also BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544-545 (1994)) (without a "clear and manifest" indication to the contrary, "the Bankruptcy Code will be construed to adopt, rather than to displace, pre-existing state law.").

Congress provided no indication of an intention to stray from the requirement that a secured creditor to be allowed to credit bid the debt. In fact, Congress was aware of the longstanding practice of allowing a secured creditor to credit bid at a foreclosure sale when it wrote § 1129(b)(2)(A). *See* 124 Cong. Rec. 31795, 32407 (Sept. 28 1978) (remarks by Rep. Edwards) ("Sale of property . . . *under the plan* is excluded from treatment under section 1111(b) because of the secured party's right to bid in the full amount of the allowed claim at any sale of its collateral under section 363(k).") (emphasis added); *see also* 124 Cong. Rec. 33130, 34007 (Oct. 6, 1978) (remarks of Sen. DeConcini) (same).[4]

Since credit bidding is a long established pre-Code practice of which Congress was well aware, the most plausible interpretation of § 1129(b)(2)(A) is that it continued the practice requiring that an objecting secured creditor be allowed to credit bid.

[4] Senator DeConcini and Representative Edwards were the floor leaders of the bill which was enacted as the 1978 Bankruptcy Code. This Court has relied on their statements in interpreting provisions of the Bankruptcy Code. *See, e.g., Begier v. I.R.S.*, 496 U.S. 53, 63-66, 64 n 5 (1990) ("Because of the absence of a conference and the key roles played by Representative Edwards and his counterpart floor manager Senator DeConcini, we have treated their floor statements on the Bankruptcy Reform Act of 1978 as persuasive evidence of congressional intent."); *Commodity Futures Trading Com'n v. Weintraub*, 471 U.S. 343, 351 (1985).

C. Section 1129(b)(2)(A) should be interpreted to require a secured creditor to be allowed to credit bid in order to effectuate the will of Congress to enact legislation that does not raise a potential constitutional objection.

Congress stated that it followed *Murel's* approach in writing clause (iii). As stated in the legislative history, "[t]he indubitable equivalent language is intended to follow the strict approach taken by Judge Learned Hand in *In re Murel Holding Corp.*, 75 F.2d 941 (2d Cir. 1935)." S.Rep. 95-989 at 127 (1978). *Murel* stated that the provisions for confirming a plan in the face of a secured creditor's objection should be construed in conformity with constitutional limitations. *Murel*, 75 F.2d at 942. *See also Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (construing federal statutes to avoid constitutional problems "is a cardinal principle of statutory interpretation"); *Gomez v. United States*, 490 U.S. 858, 864 (1989) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question."); *Public Citizen v. Dept of Justice*, 491 U.S. 440, 466 (1989) ("[T]he Court will construe the statute to avoid such [constitutional] problems unless such construction is plainly contrary to the intent of Congress.").

Because the right to credit bid is a property right, a plausible interpretation of § 1129(b)(2)(A) is that Congress provided for credit bidding in

clause (ii) so as to avoid a potential challenge to § 1129(b)(2)(A) under the Fifth Amendment.[5]

POINT II

THE "INDUBITABLE EQUIVALENT" METHOD UNDER CLAUSE (iii) OF § 1129(b)(2)(A) SHOULD NOT BE INTERPRETED AS PERMITTING A SALE OF AN OBJECTING SECURED CREDITOR'S COLLATERAL WITHOUT ALLOWING CREDIT BIDDING, BECAUSE THERE IS NO EQUIVALENT FOR THE SECURED CREDITOR'S RIGHT TO CREDIT BID.

A plan of reorganization may be confirmed over the objection of a class of secured creditors "if the plan ... is fair and equitable" to them. § 1129(b)(1). A chapter 11 plan generally places a mortgage claim in its own class because a particular mortgage claim is usually not substantially similar to other secured claims. *See* § 1122(a). Section 1129(b)(2)(A) states that a plan is fair and equitable if it provides "(iii) for the realization by such holders of the indubitable equivalent of such claims." Under § 101(5)(A), the word "claim," when

[5] Because a Fifth Amendment question is not before this Court in the present case, the Court need not address (and the *Amici* take no position on) the extent to which secured creditors must be afforded credit bidding rights in bankruptcy proceedings as a constitutional matter. Nonetheless, given the prominence of secured creditors' credit-bidding rights in *Radford* and *Wright*, a congressional decision to codify credit-bidding rights in § 1129(b)(2)(A) would prevent potential constitutional concerns, and the *Amici* urge that this Court interpret § 1129(b)(2)(A) accordingly.

used in the 1978 Bankruptcy Code, means "right to payment." When an objecting secured creditor's collateral is being sold in a bankruptcy case free of its lien, it has been long established that the secured creditor has a right to payment of the cash proceeds of the sale, or, if less than the unpaid debt owed to it, to get the property itself pursuant to a credit bid. In that regard, when credit bidding, the secured creditor is entitled to bid the full amount of the debt even if a prior lower valuation was made in the bankruptcy court under § 506(a), and it is noted that "the bid at the sale would be determinative of value." S. Rep. 95-989 at 56 (1978). Caselaw recognizes that credit bidding is the means for a secured creditor to realize the most from the sale. Section 1129(b)(2)(A) should thus be interpreted as requiring that a plan provide that such sale be held pursuant to clause (ii) because that clause preserves a secured creditor's right to credit bid. It should also be interpreted as not allowing the auction to proceed under clause (iii) where the plan does not provide for credit bidding, because there is no equivalent for credit bidding and thus no substitute that can satisfy the "indubitable equivalent" standard.

A. *Murel*'s "strict approach" is the foundation of clause (iii)'s "indubitable equivalent" method.

Although there is no statutory definition of "indubitable equivalent," Judge Learned Hand's opinion in *Murel*, 75 F.2d at 942, was the foundation for the introduction of § 1129(b)(2)(A)(iii)'s "indubitable equivalent" method for confirming a plan over the objection of a secured creditor. As stated in the legislative history of § 1129(b)(2)(A):

"The indubitable equivalent language is intended to follow the *strict approach* taken by Judge Learned Hand in *In re Murel Holding Corp.* . . ." S. Rep. 95-989 at 127 (1978) (emphasis added). *Murel* provides meaningful insight into what Congress understood as Judge Hand's "strict approach" and his concept of an "indubitable equivalent," which it adopted for clause (iii). As discussed below, the lower courts, in addressing clause (iii), have usually cited *Murel* as the origin of the "indubitable equivalent" concept, but failed to examine and understand *Murel's* illumination of its meaning. An understanding of *Murel* is important because it leads to the conclusion that clause (iii) is not available to confirm a plan providing for a free and clear sale of an objecting secured creditor's collateral that does not allow it to credit bid.

B. *Murel's* meaning of "indubitable equivalent."

The essence of Judge Hand's "strict approach" imported by Congress into clause (iii) is that for a plan to be confirmed over the objection of a secured creditor it must fairly and equitably provide for the secured creditor "to get his money or at least the property." 75 F.2d at 942. The strictness of Judge Hand's approach is found in his crucial requirement that any impairment of the right of an objecting secured creditor to get paid in full or the property, is allowed only if by means of "a substitute of the *most* indubitable equivalence." *Id.* (emphasis added). The *Amici* urge that, properly understood, that standard is not satisfied if the secured creditor is not allowed to credit bid.

Although *Murel* introduced the "indubitable equivalent" requirement, and is found at the heart of the controversy over the rights of an objecting secured creditor whose collateral is to be sold under a chapter 11 plan, lower courts have generally not realized the significant impact of Judge Hand's thinking. This appeal presents the first opportunity for this Court to recognize the significance of Judge Hand's approach as the basis for understanding clause (iii), and why that clause cannot be used to confirm a plan that provides for a sale of collateral without allowing credit bidding. The Seventh Circuit below, in holding that clause (iii) could not be used where a chapter 11 plan provides for a free and clear sale of an objecting secured creditor's collateral without allowing credit bidding, did not cite *Murel*, and the Third Circuit's majority opinion in *In re Philadelphia Newspapers, LLC*, 599 F.3d 298, 310 (2010), in allowing the use of clause (iii) for such a sale, did no more than to observe that *Murel* is "rarely explained in case law," citing the Fifth Circuit's decision in *In re Pacific Lumber Co.*, 584 F.3d 229, 246 (2009). The majority opinion in *Philadelphia Newspapers* also failed to recognize that *Pacific Lumber* did not understand the impact on the § 1129(b)(2)(A) issue of *Murel's* words and the crux of Judge Hand's understanding that "the most indubitable equivalence" requires "the most" assurance for the secured creditor "to get his money or at least the property." *See Pacific Lumber*, 584 F.3d at 246 (quoting *Murel*, 75 F.2d at 942). Instead, *Pacific Lumber* found the plan at issue to have satisfied the statute because it provided for payment of the judicially determined value of the collateral, rejecting the secured cred-

itors' protestation that by not allowing them to credit bid, they were not given an "indubitable equivalent" because they "forfeited the possibility of later increases in the collateral's value" being realized by them. *Id.* at 247. This appeal enables this Court to clear up the confusion in the lower courts over how Congress intended to protect objecting secured creditors when their collateral is to be sold under a plan.[6]

In *Murel*, the bankruptcy court below enjoined further prosecution of a secured creditor's state court mortgage foreclosure proceeding. In the bankruptcy court, the debtor filed a plan of reorganization under which the debtor would retain its ownership of the property, and which preserved the secured creditor's mortgage lien while stretching out the principal of the mortgage debt for 10 years. On appeal, the injunction staying foreclosure was reversed based on a finding that the plan would not provide the secured creditor with "adequate protection," as required by the provision of the former Bankruptcy Act for confirming a plan over the objection of a secured creditor. Judge Hand's opinion in *Murel* was based on his conclusion that the evidence introduced below failed to show that the plan would provide, as required for confirmation, an assurance that the secured creditor's claim would be paid in full at the end of its 10 year moratorium provision. Judge Hand's strict approach was to require that the

[6] This appeal does not raise the question whether, or under what circumstances, a disallowance for cause of a secured creditor's right to credit bid at a sale of its collateral, as authorized by § 363(k), may be unconstitutional under the Fifth Amendment.

plan protect the secured creditor by nothing less than "a substitute of the most indubitable equivalence." *Murel*, 75 F.2d at 942.

Testing a plan that provides for the sale of an objecting secured creditor's collateral under Judge Hand's "strict approach" plainly requires that the secured creditor be assured that it will "get his money or at least the property." *Id.* As he explained:

> In construing so vague a grant [requiring "adequate protection"], we are to remember not only the underlying purposes of the section, but the constitutional limitations to which it must conform. It is plain that "adequate protection" must be completely compensatory; and that payment ten years hence is not generally the equivalent of payment now. Interest is indeed the common measure of the difference, but a creditor who fears the safety of his principal will scarcely be content with that; *he wishes to get his money or at least the property*. We see no reason to suppose that the statute was intended to deprive him of that in the interest of junior holders, unless by *a substitute of the most indubitable equivalence*.

Id. (emphasis added).

Barely two months after *Murel* was decided, the rights of secured creditors were fully examined in this Court's May 1935 decision in *Radford*, in which this Court, like *Murel*, made it clear that a secured creditor has a paramount right "to insist upon . . . full payment or the mortgaged property,"

and in which this Court also made clear that credit bidding is the means to protect that paramount right of the mortgagee. *Radford*, 295 U.S. at 594-595.

In sum, the "strict approach" built into § 1129(b)(2)(A) requires that a plan provide an objecting secured creditor with the best chance to get full payment of the debt in cash from the auction, or, in the absence of a sufficient bid to enable full payment in cash, assures the secured creditor of the opportunity to own the property by means of credit bidding, so that its appreciation in value will inure to the secured creditor rather than the debtor or others. Allowing credit bidding is the best—indeed the only—means to implement Judge Hand's "strict approach" requiring "the most indubitable equivalent." That standard cannot be satisfied without allowing credit bidding where an objecting secured creditor's collateral is to be sold in a free and clear sale, because, as shown below, there is no equivalent that can be substituted for it.

C. Credit bidding protects a mortgagee's right to full payment or the property.

The right of a mortgagee to get paid the full amount of the mortgage debt or at least the property by means of credit bidding, has long been recognized by this Court. *Radford*, 295 U.S. at 579-580. In amplifying the critical importance of this right, this Court stated in *Radford*:

> No instance has been found, except under the [unconstitutional] Frazier-Lemke Act (11 USC § 203(s), of either a statute or decision compelling the mortgagee to

> relinquish the property to the mortgagor free of the lien unless the debt was paid in full. *This right of the mortgagee to insist upon full payment before giving up his security has been deemed the essence of a mortgage.* His position in this respect was not changed when foreclosure by public sale superseded strict foreclosure or when the Legislatures of many states created a right of redemption at the sale price. *To protect his right to full payment or the mortgaged property, the mortgagee was allowed to bid at the judicial sale on foreclosure.*

Id. (emphasis added).

In *Radford*, this Court singled out a secured creditor's right to credit bid as being designed to "assure" that the secured creditor will get either the proceeds of the auction or the property itself:

> The right [to credit bid is] to protect its interest in the property by bidding at such sale whenever held, and thus to *assure* having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair competitive sale or by taking the property itself.

Id. at 594-595. (emphasis added).

Notably, Petitioner's Brief does not address or even cite *Radford*. Petitioner's Brief also failed, in its interpretation of § 1129(b)(2)(A), to comprehend the significance of the words carefully chosen by Judge Hand in *Murel*, having cited it only once, in its short footnote 1.

The Seventh Circuit below correctly held that a plan under which the secured creditor's collateral is to be auctioned does not provide the "indubitable equivalent" of its claim "without allowing credit bidding." *Matter of River Road Hotel Partners, LLC*, 651 F.3d 642, 651 (7th Cir. 2011). In so ruling, the court below recognized that the unique function of credit bidding was built into both § 363(k) and clause (ii) of § 1129(b)(2)(A) to prevent the extinguishment of a secured creditor's lien for less than the true value of its collateral:

> By granting secured parties this ability [to credit bid], the Code provides lenders with means to protect themselves from the risk that the winning auction bid will not capture the asset's actual value. If a secured lender feels that the bids that have been submitted in an auction do not accurately reflect the true value of the asset and that a sale at the highest bid price would leave them undercompensated, then they may use their credit to trump the existing bids and take possession of the asset. In essence, by granting secured creditors the right to credit bid, the Code promises lenders that their liens will not be extinguished for less than face value without their consent. This protection is important since there are [a] number of factors that create a substantial risk that assets sold in bankruptcy auctions will be undervalued.

Id. at 650-651.

Indeed, Congress itself understood that for a secured creditor to gain the ownership of its col-

lateral from the auction, rather than accepting a cash bid of less than the debt, the secured creditor may credit bid up to the full amount of the debt, and may do so even if there had been a lower valuation of its collateral earlier in the bankruptcy case. *See* S. Rep. 95-989 at 56 (1978) (The secured creditor may "set off against the purchase price up to the amount of such entity's claim. No prior valuation under section 506(a) would limit this bidding right, since the bid at the sale would be determinative of value.").

In the *Amici's* view, the Third Circuit's majority got it wrong in *Philadelphia Newspapers*, 599 F.3d 298 (2010). After acknowledging that a secured creditor could credit bid at a § 363(b) auction sale up to the full amount of its loan, *id.* at 311, the majority opinion in that case erred by basing its holding on the premise that the adequacy of the plan's protection of a secured creditor should be determined before the auction in a proceeding in which the bankruptcy judge makes an "indubitable equivalent" finding by considering "other forms of compensation" for the secured creditor's collateral, rather than by the auction. *Id.* at 312. The majority opinion made its premise unmistakably clear by stating: "In other words, it is the plan of reorganization, and not the auction itself, that must generate the 'indubitable equivalent.'" *Id.* It thus held that a plan providing for the sale of collateral without allowing credit bidding, could nevertheless somehow be found to provide an indubitable equivalent, and rejected the contention that a secured creditor is denied an indubitable equivalent because it is not allowed to credit bid. The court, however, did not—indeed it

could not—offer any explanation of how, without credit bidding, the secured creditor would be assured of getting full payment of the debt or at least the property.

It is also evident that the approach of the Third Circuit's majority opinion in *Philadelphia Newspapers* is at odds with *Murel's* "strict approach" built into § 1129(b)(2)(A), which requires that the secured creditor's rights be indubitably protected. A determination by a judge at a hearing to consider whether a plan's provisions are equivalent to the secured creditor's right to get payment in full or at least the property, provides far less reliability and protection than does credit bidding, which provides the secured creditor with a market valuation and an assurance of receiving payment of the cash bid or the property itself if it believes that the highest market bid in cash is less than the true value of the property.

Significantly, the premise of the Third Circuit's majority in that case that the adequacy of a plan's protections for a secured creditor should be determined by means of a bankruptcy judge's evaluation, rather than by an auction, is undercut by this Court's clear preference for determining value by a market exposure, not by judicial valuation. In this regard, this Court stated in *Bank of America Nat. Trust and Savings Ass'n v. 203 North LaSalle Street*:

> Under a plan granting an exclusive right, making no provision for competing bids or competing plans, any determination that the price was top dollar would necessarily be made by a judge in bankruptcy court, whereas the best way to determine value

> is exposure to a market . . . . This is a point of some significance, since it was, after all, one of the [1978] Code's innovations to narrow the occasions for courts to make valuation judgments. . . .

526 U.S. 434, 457 (1999).

It is clear that a sale of a secured creditor's collateral without a right to credit bid, which cuts off its right to take the property rather than accepting an amount of cash that is less than the unpaid debt, does not satisfy the "indubitable equivalent" standard:

> It is thus illogical to believe or assume that paying the lender the court-determined value of its collateral (despite the fact that the lender may have an unsecured deficiency claim) actually provides the lender with the indubitable equivalent of its secured claim when the sale of its collateral is made without a true market test . . . . The lender's collateral—and the amount of its secured claim—is not protected from undervaluation when credit bidding is foreclosed, and a lender can therefore never receive the indubitable equivalent of its claim when a sale proceeds under clause (iii) without the right to credit bid.

Jason S. Brookner, *Pacific Lumber and Philadelphia Newspapers: The Eradication of a Carefully Constructed Statutory Regime Through Misinterpretation of Section 1129(b)(2)(A) of the Bankruptcy Code*, 85 AM. BANKR. L. J. 127, 146-147 (2011).

Under the "strict approach" imported into § 1129(b)(2)(A) from Judge Hand's opinion in *Murel*, clause (ii) is thus the only provision that may be used to confirm a plan that provides for a free and clear sale of an objecting secured creditor's collateral. This is because there is nothing equivalent to the assurance that a secured creditor has by means of credit bidding to get the cash proceeds of the sale, or if less than the debt, to get its collateral, much less an indubitable one. As aptly stated by Professor Ralph Brubaker, where a plan provides for the sale of an objecting secured creditor's collateral "there is no indubitably equivalent substitute for the secured creditor's right to credit bid at the sale." Ralph Brubaker, *Cramdown of an Undersecured Creditor Through Sale of the Creditor's Collateral*, 29 No. 12 BANKRUPTCY LAW LETTER 1, 11 (Dec. 2009).[7]

The imperative of *Murel's* "strict approach" is that, to confirm a plan providing for a free and clear sale of an objecting secured creditor's collateral, the plan must allow for credit bidding. For this reason, § 1129(b)(2)(A) should be interpreted to require that where a plan provides for the sale of an objecting secured creditor's collateral, it must be held under clause (ii), and may not be conducted under clause (iii) without allowing the secured creditor to credit bid.

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[7] Professor Brubaker's December 2009 article was cited approvingly by dissenting Judge Ambro in *Philadelphia Newspapers*, 599 F.3d at 325, 327, 334, 336, 337, whose dissent was found "to be compelling" by the Seventh Circuit in its opinion below. *See River Road*, 651 F.3d at 649.

POINT III

CREDIT BIDDING IS A LONG ESTABLISHED PRACTICE BASED ON THIS COURT'S EQUITY JURISPRUDENCE. CONGRESS GAVE NO HINT OF ANY INTENTION TO TERMINATE THAT PRACTICE WHEN ENACTING § 1129(b)(2)(A), WHICH SHOULD BE INTERPRETED TO REQUIRE CREDIT BIDDING AT A SALE OF AN OBJECTING SECURED CREDITOR'S COLLATERAL.

Congress carried the longstanding practice of allowing credit bidding into § 1129(b)(2)(A) by the clear and specific words it used for its clause (ii). It is thus not plausible to attribute to Congress an intent that clause (iii) could be used as a substitute for the secured creditor's established property right to credit bid when it highlighted such right by clause (ii)'s clarity and provided no suggestion in that statute or its legislative history of an intent to jettison that practice.

A. The longstanding practice of credit bidding.

For at least two centuries, courts have recognized a mortgagee's right to credit bid. *See Nichols*, 19 Johns at 92 ("It would be unreasonable, and injurious to debtors, as well as creditors, to insist, that the creditor on the execution should advance money on his bid, when the sole object of the sale, is to put money in his pocket, by paying a debt due to him."); *Sage v. Cent. R.R. Co.*, 99 U.S. 334, 339, 344-345 (1878) (noting well known practice by bondholders to credit bid their secured

claims in railroad reorganizations); *see also* Leonard A. Jones, 2 LAW OF MORTGAGES OF REAL PROPERTY § 1614 (2d. ed. 1879). The practice of allowing credit bidding was again recognized by this Court in *Easton*, 127 at 538-539, *Radford*, 295 U.S. at 594 n.4, and *Wright*, 300 U.S. at 459, 459 n.4.

Importantly, Congress was well aware of the practice of credit bidding when it drafted § 1129(b)(2)(A). *See* 124 Cong. Rec. 33130, 34007 (Oct. 6, 1978) (remarks of Sen. DeConcini) ("Sale of property . . . *under the plan* is excluded from treatment under section 1111(b) because of the secured party's right to bid in the full amount of the allowed claim at any sale of its collateral under section 363(k).") (emphasis added); 124 Cong. Rec. 31795, 32407 (Sept. 28, 1978) (remarks of Rep. Edwards) (same).[8]

Congress broadly enacted § 363(k) and § 1129(b)(2)(A)(ii) to preserve the practice of credit bidding in all bankruptcy sales, not to limit it merely to pre-plan sales.

B. A setoff is an equitable principle, which Congress presumably intended to preserve by allowing secured creditors to credit bid at sales under a plan.

Congress must have understood that § 1129(b)(2)(A) would be interpreted in light of the notion that setoff is an equitable principle. *See*

[8] Senator DeConcini and Representative Edwards were the floor leaders of the bill which enacted the 1978 Bankruptcy Code. This Court has relied on their statements in interpreting provisions of the Bankruptcy Code. *See* discussion in note 4 *supra*.

Pepper v. Litton, 308 U.S. 295, 304 (1939) (bankruptcy courts apply "the principles and rules of equity jurisprudence."). Allowing a secured creditor to use the debt to it as the currency for paying the purchase price it bid at the auction implements the equitable nature of setoff. Given that the secured creditor has already invested cash for the property at the inception of the loan transaction, it would be inequitable to require the secured creditor to advance still more cash to get the property where the high cash bid is less than the debt.

By allowing a setoff of the debt, the debt becomes a substitute for cash. *See Easton*, 127 U.S. at 538-539 (holding that a credit bid "[i]n fact and in law . . . was a payment of money"); *Hadley Falls Trust Co. v. United States*, 110 F.2d 887, at 891-892 (1st Cir. 1940) ("[W]hen a mortgagee buys in the property, he 'pays' for it with so much of the mortgage obligation as is applied to the bid price; in substance, there is a cancellation or offset of cross-claims between mortgagor and mortgagee.").

Setoff is "favored and encouraged by the law" as a means "to avoid circuity of action and injustice." *N. Chicago Rolling-Mill Co. v. St. Louis Ore & Steel Co.*, 152 U.S. 596, 615-616 (1894); *Studley v. Boylston Nat. Bank*, 229 U.S. 523, 528 (1913). As this Court has recognized more recently, setoff enables parties to apply debts against each other and thereby avoid "'the absurdity of making A pay B when B owes A.'" *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 18-19 (1995) (quoting *Studley*, 229 U.S. at 528).

Congress gave no hint in the legislative history of § 1129(b) that it intended to allow confirmation

of a plan that did not allow credit bidding at a free and clear sale of an objecting secured creditor's collateral. Section 1129(b)(2)(A) should be plausibly interpreted to require that such a plan allow credit bidding.

C. The legislative history of § 1129(b) contains no suggestion that Congress intended to discontinue the practice of credit bidding at sales under a plan.

There is no indication in the legislative history of § 1129(b)(2)(A), or in that provision itself, that Congress thought that a sale of an objecting secured creditor's collateral under a plan could be made without allowing credit bidding. Nor is there any indication that Congress ever considered as a possibility that such a sale could be effected under clause (iii) without allowing credit bidding.

It is not plausible to construe § 1129(b)(2)(A) as permitting such a sale without allowing the secured creditor to credit bid. This is because it is presumed that Congress does not effectuate a great change from prior practice without making it clear by the text of the relevant statute or by some indication in its legislative history. *See Dewsnup*, 502 U.S. at 419-420; *see also BFP*, 511 U.S. at 544-545 (1994) (without "clear and manifest" indication to the contrary, "the Bankruptcy Code will be construed to adopt, rather than to displace, pre-existing state law."); *Stern v. Marshall*, 131 S. Ct. 2594, 2621 (2011) (Scalia, J., concurring) (a statute may be sustained on the basis of "a firmly established historical practice").

Thus, the most plausible understanding of § 1129(b)(2)(A) is that Congress enacted clause (ii)

as the method for confirmation of a plan that provides for such sale, and did not write clause (iii) to enable making such a sale without allowing credit bidding. For this reason, the *Amici* urge the Court to rule that such a sale must be held in accordance with clause (ii).

CONCLUSION

Based on the forgoing and Respondent's Brief, the order appealed from should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

RADLAX GATEWAY HOTEL, LLC, et al.,

Petitioners,

v.

AMALGAMATED BANK,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR BANKRUPTCY SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

Amici curiae are law scholars who write and teach about bankruptcy and corporate reorganization.[1]

Douglas G. Baird is the Harry A. Bigelow Distinguished Service Professor of Law at the University of Chicago Law School.

Nicholas L. Georgakopoulos is the Harold R. Woodard Professor of Law at Indiana University Robert H. McKinney School of Law.

M. Todd Henderson is Professor of Law at the University of Chicago Law School.

Amici have a professional interest in illuminating this Court's consideration of the important and complicated questions this case presents.

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[1] The parties have consented to the filing of this brief. written evidence of which accompanies the filing. No counsel for a party authored this brief in whole or in part, and no person (other than *amici curiae* or their counsel) made a monetary contribution intended to fund the preparation or submission of this brief.

STATUTORY PROVISION IN ISSUE

11 U.S.C. § 1129(b)(2) states:

> (1) Notwithstanding Section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.
>
> (2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:
>
> (A) With respect to a class of secured claims, the plan [must] provide[ ] –
>
> (i)
>
> (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and
>
> (II) that each holder of a claim of such class receive on account of

such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

* * *

STATEMENT

This case presents the question whether a bankruptcy court may confirm, over creditor objection, a plan of reorganization that proposes to sell substantially all of the debtor's assets without permitting the secured creditors to bid for the assets with credit. The short answer is that because credit bidding maximizes the value of the bankruptcy estate and ensures

that secured creditors receive the full value of their collateral, the decision below should be affirmed.[2] A debtor in bankruptcy may not auction itself while forbidding secured creditors from using the debtor's obligation as consideration for the purchase.

To see why, it is important to understand first what credit bidding is, and what it is not. In the simplest terms, a credit bid is a creditor's offer to buy assets by offsetting the debt owed to him by the amount of the bid. *See Freedom Mortgage Corp. v. Burnham Mortgage, Inc.*, 569 F.3d 667, 670 (7th Cir. 2009); *In re Phila. Newspapers, LLC*, 599 F.3d 298, 320-21 (3d Cir. 2010) (Ambro, J., dissenting). Take a simple example. Suppose that debtor D owes $100 to secured creditor C, whose security interest extends to all of debtor's assets. The object of the credit bid is one asset of D. If C values it at $60, a credit bid is C's offer to reduce D's $100 debt to $40 in exchange for the asset. The creditor essentially uses the debt as a form of currency. If he wins the auction, C comes away with the asset and a $40 secured claim.

As far as a bankruptcy estate is concerned, the results of a senior creditor's credit bid exactly replicate the results of a cash bid. Returning to the hypothetical above, imagine that creditor C, who still values the asset at $60, is prohibited from credit

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[2] *Amici* agree with Petitioners that this controversy is not moot. Hence *Amici* believe this Court's jurisdiction to decide the case is secure.

bidding. To fund his bid, C must take out a $60 loan from Bank. At auction he offers cash for the asset, and wins, paying debtor D cash from the bank loan. Now D turns around and remits the proceeds of the collateral sale to C. (As the secured creditor, C has a right to sale proceeds up to the amount of his security interest. 11 U.S.C. § 506(a).) C applies the $60 to repay Bank for the initial loan. Just as when credit bidding was allowed, the story ends with C in possession of the asset and D still owing C $40. Whether C's bid and payment are in the form of cash or credit has no effect on D or the assets of the bankruptcy estate, and hence does not alter the rights of D's general creditors or other junior claimants. *See* Vincent S. J. Buccola & Ashley C. Keller, *Credit Bidding and the Design of Bankruptcy Auctions*, 18 Geo. Mason L. Rev. 99, 103-04 (2010) (providing mathematical model). The logic of credit bidding is that it avoids a senseless shuffling of funds from Bank to Creditor to Debtor back to Creditor and, finally, to Bank.

But these simplified hypotheticals omit the transaction costs associated with C's bank loan – the fees and interest he must pay to obtain the loan. From the secured creditor's perspective, transaction costs are part of the price paid for the asset. Assume Bank charges C $5 in fees and interest to make the loan. If C values the asset at $60, his reservation price at auction will be only $55, $5 less than his reservation price if he is allowed to credit bid. If C's $55 bid carries the day, C gets the asset and is left with a $45 secured claim instead of the $40 claim he had when

allowed to pay with credit. To D, and therefore to the bankruptcy estate and its residual claimants, that is $5 left on the table that could have been used to satisfy other claims against the estate. Each dollar C pays in financing costs reduces by a dollar the bankruptcy estate.

A trustee is charged with maximizing the value of the bankruptcy estate. *Wabash Valley Power Ass'n, Inc. v. Rural Electrification Admin.*, 903 F.2d 445, 451 (7th Cir. 1990). Given this mandate, it is not immediately clear why the debtors in this case seek to exclude a potential bidder – or to reduce a potential bidder's reservation price – by imposing transaction costs. More bidders mean a higher expected sale price. *See* Buccola & Keller, *supra*, at 119-20. A rational seller should want to reduce transaction costs for prospective buyers, not increase them. The answer, here as in many other cases, is that the debtors have a preferred buyer in mind. It is not necessarily the buyer who will contribute the most to the estate in exchange for its assets. It is rather a buyer who has something to offer the debtors' management or other insiders. *See* Resp. Br. 12-13 (noting that a principal of the debtors, Peter Dumon, had an interest in the debtors' preferred "Stalking Horse" bidder); *see also Phila. Newspapers*, 599 F.3d at 320 (Ambro, J., dissenting).

SUMMARY OF THE ARGUMENT

The decision below should be affirmed, but on a rationale different from that adopted by the Seventh Circuit and urged by Respondent in this Court. The Seventh Circuit was right that Section 1129(b)(2) of the Bankruptcy Code guarantees a secured creditor's right to bid credit when the debtor proposes to sell substantially all of its assets – but not because Congress intended, without saying so, that subsection (b)(2)(A)(ii) apply to all sale plans. A plan satisfying any of the three clauses of subsection (b)(2)(A) may be crammed down, provided that the plan be "fair and equitable."

But there lies the rub. An auction plan that bars credit bidding is not "fair and equitable" within the meaning of the Bankruptcy Code. Credit bidding is an auction feature that can augment and cannot diminish the sale price of a debtor's assets. Credit bidding increases the pool of knowledgeable buyers and decreases transaction costs associated with submitting a bid, both of which tend to drive up the assets' sale price and therefore creditor recoveries. Under the longstanding principle of *Butner v. United States*, 440 U.S. 48 (1979), moreover, a claimant's state-law property rights are preserved throughout reorganization absent a bankruptcy-specific justification for their extinction. Because credit bidding (1) maximizes the value of the debtor's estate, which is an unmitigated good for the junior claimants, and (2) ensures that a secured creditor receives the value of his collateral, as he would in a sale under, for example, Article 9 of the

Uniform Commercial Code, a sale plan that eschews credit bidding is not fair and equitable.

ARGUMENT

In the typical bankruptcy, a plan of reorganization can be confirmed only with the consent of every impaired class of creditor. 11 U.S.C. § 1129(a)(8). The rule covers cases such as this where the debtor "reorganizes" by selling itself as a going concern to the highest bidder. To discourage unreasonable holdouts, however, the Bankruptcy Code allows the bankruptcy judge to confirm a plan over creditor objection – to "cram down" the plan, in the parlance of bankruptcy practice – if the plan meets specified conditions. 11 U.S.C. § 1129(b); *see Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441 (1999).

Under Section 1129(b)(1), the court may cram down "if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." The next subsection, (b)(2), says that "the condition that a plan be fair and equitable with respect to a class *includes* the following requirements" (emphasis added), and goes on to list three, each of which can be fulfilled in multiple ways. 11 U.S.C. § 1129(b)(2).

The parties disagree about the meaning of one of subsection (b)(2)'s requirements, namely subsection

(b)(2)(A). Petitioners argue that because the word "or" disjoins the subsection's three clauses, a plan is confirmable if it has any of the three enumerated features. Respondent, on the other hand, thinks it implied in the structure of the statute that the condition following romanette (ii) is mandatory in every plan proposing to sell assets free and clear of liens.

Petitioners are right about the meaning of subsection (b)(2)(A). A plan satisfies that subsection's "requirement," as the Code terms it, if the plan has any one of the three enumerated features. But Petitioners are wrong to suggest that every plan meeting the minima established by subsection (b)(2)(A) should be crammed down. *See* Pet. Br. 5, 9-11. The requirements of subsection (b)(2)(A) are necessary but insufficient. A plan that, for example, permitted the debtor to extract a pound of the winning bidder's flesh would not be "fair and equitable," 11 U.S.C. § 1129(b)(1), even if it met one of the requirements of subsection (b)(2)(A). The same goes for an auction plan that proposes to sell substantially all of the debtor's assets while barring credit bids.

I. Section 1129(b)(2)(A)(ii) Does Not by Terms Require that an Auction Plan Permit Credit Bidding

Chapter 11 plans of reorganization vary depending on the debtor's agenda. Some are designed to promote a *bona fide* reorganization, where the debtor uses statutory avenues to escape onerous contracts,

refine its operations while staving off creditors who might otherwise levy on the firm's assets, and emerge from bankruptcy with a financially viable balance sheet. Other plans, such as the plan at issue in this case, contemplate a sale of the debtor as a going concern. The sale generates a pool of cash used by the estate to pay allowed claims according to the priorities the Bankruptcy Code establishes.

The Code does not categorize types of plans, however. It speaks simply of "a plan" or "the plan." *E.g.*, 11 U.S.C. § 1129(a). More specifically, the requirements of cramdown do not vary by type of plan. Section 1129 says only that "the plan" is confirmable if "it does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." 11 U.S.C. § 1129(b)(2). Subsection (b)(2)(A)(ii) allows "the plan" to fulfill one of the prerequisites to cramdown if it provides for an asset sale at which credit bidding is permitted. It does not say that asset sales at which credit bidding is verboten *cannot* otherwise fulfill the requirements.

Following the opinion of the court of appeals (as well as Judge Ambro's dissent in *In re Philadelphia Newspapers, LLC*, 599 F.3d 298, 321-38 (3d Cir. 2010)), Respondent argues that subsection (b)(2)(A)(ii) of Section 1129 is more "specific" than subsection (b)(2)(A)(iii) – that, in other words, subsection (b)(2)(A)(ii) would be obsolete under the debtors' reading. Resp. Br. 27-29. In order to give each statutory phrase meaning, Respondent argues, the Court should construe

(b)(2)(A)(iii) not to apply when the plan of reorganization proposes to sell assets free and clear of liens. *See ibid.*

The argument is misguided. The canon favoring preservation of specific provisions matters only when one statutory provision is a subset of another. *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 335-36 (2002) ("The specific controls but only within its self-described scope."); *Katz v. Gerardi*, 552 F.3d 558, 561-62 (7th Cir. 2009). Each of the two provisions at issue here covers cases not covered by the other. A plan could allow credit bidding without delivering the indubitable equivalent of the secured claim (if, for example, the plan proposed to conduct an auction on such a truncated timetable that high-value buyers could not be located); and yet a plan could offer secured creditors the indubitable equivalent of their claims without falling in subsection (b)(2)(A)(ii)'s domain (if, for example, the plan did not propose to sell assets free and clear of liens). Neither rule governs every case governed by the other. The Bankruptcy Code's language, rather than a canon, must supply the answer. *Katz*, 552 F.3d at 562.

The Third and Fifth Circuits reached this conclusion in two recent decisions. *Phila. Newspapers*, 599 F.3d 298; *In re Pacific Lumber Co.*, 584 F.3d 229 (5th Cir. 2009). In *Amici*'s view, parsing section 1129(b)(2)(A) does not resolve this case, but the *Philadelphia Newspapers* and *Pacific Lumber* courts parsed it correctly. In each case, the court observed that the secured creditors' reading would impermissibly convert the

word "or," which is in the statute, to "and," which is not. *Phila. Newspapers*, 599 F.3d at 305; *Pacific Lumber*, 584 F.3d at 245-46. No more ink need be spilt.

II. An Auction Plan that Forbids Credit Bidding Is Not "Fair and Equitable"

The bedrock rule of cramdown is that a court may confirm only a plan that "does not discriminate unfairly, and is fair and equitable, with respect to" each impaired class. 11 U.S.C. § 1129(b).

When applied to evaluate the sufficiency of a proposed plan of reorganization, the phrase "fair and equitable" is to be understood according to the aims of bankruptcy law, as Congress gives them. *In re Luster*, 981 F.2d 277, 280 (7th Cir. 1992) ("When construing ambiguities in bankruptcy statutes, courts consider goals that infuse the structure of the laws – goals such as preventing a race among creditors that reduces the total value of the estate, distributing assets according to contractual and statutory entitlements, and providing natural persons with 'fresh starts' so that they again can claim the rewards of their labor."). That is the approach this Court took when it held that the absolute-priority rule is encoded in the phrase "fair and equitable," *United States v. Key*, 397 U.S. 322, 327 (1970); *Northern Pacific Railway Co. v. Boyd*, 228 U.S. 482 (1913), long before absolute priority was codified as a prerequisite to cramdown, 11 U.S.C. § 1129(b)(2)(B).

Denying secured creditors the right to credit bid in a going-concern sale is unfair within the meaning of the Code because credit bidding maximizes the value of the estate and simultaneously ensures that a secured creditor receives the value of the property interest conferred on him under state law. Credit bidding furthers rather than detracts from the goals of bankruptcy. Absent an unusual justification – the Code terms it "cause," *see* 11 U.S.C. § 363(k) – credit bidding should be a mandatory feature of going-concern auction plans.

A. Credit Bidding Maximizes the Value of the Debtor's Estate and the Expected Recoveries of the Estate's Claimants

The principal object of bankruptcy auctions is for the debtor to "maximize the return on the collateral" by fetching the highest price for the assets up for sale. *In re Excello Press, Inc.*, 890 F.2d 896, 906 (7th Cir. 1989). Maximizing auction proceeds augments the value of the estate, thereby ensuring the highest possible recovery to the debtor's claimants. For at least three reasons, credit bidding furthers the goal of ensuring that a bankruptcy auction attracts the highest price for the debtor's assets.

First, credit bidding grows the pool of knowledgeable bidders available at auction, increasing competition for the items on the block. Increased competition, in turn, tends to increase the price of the winning bid. *See* Buccola & Keller, *supra*, at 119.

Auction optimization theory instructs that the bidders with the highest and second-highest reservation prices will determine the sale price. Competition between bidders drives the price of the asset to that of the bidder with the second-highest reservation price, at which point the high-value bidder will submit an incrementally higher topping bid, winning the auction. *Id.*; *see also Van Zelst v. Commissioner of Internal Revenue*, 100 F.3d 1259, 1262 (7th Cir. 1996) ("[T]he market price of an asset depends on the second-most-productive use to which it can be put."). Barring credit bidders from the auction house needlessly risks excluding the high-value or second-highest-value bidder, thereby reducing the expected proceeds from the bankruptcy auction. Risking a reduction in the value of the estate is a move no debtor should reasonably take.

Second, credit bidding offers an effective check against management malfeasance. Not all debtors faithfully discharge their obligation to maximize estate value. Because corporations and the people who manage them often have misaligned interests, it is hardly implausible that a debtor's officers would seek to sell the bankrupt's business to a low-value bidder in exchange for some personal remuneration that does not redound to the benefit of the enterprise as a whole. Creditors, who bear the costs of a rigged auction, are naturally inclined to prevent inefficient sales. *Phila. Newspapers*, 596 F.3d at 336-37 (Ambro, J., dissenting); Alan Schwartz, *The Enforceability of Security Interests in Consumer Goods*, 26 J.L. & Econ.

117, 126-27 (1983). Credit bidding helps them do so. In short, the best check against a fixed auction is to increase the stock of bidders interested in purchasing the debtor's collateral.

Third, credit bidding promises to reduce transaction costs, increasing the maximum bid a credit bidder is willing to submit for the assets up for sale. A creditor's alternative to credit bidding is typically to secure cash financing to participate in the auction. But financing, even for the most creditworthy borrower, is not costless. Each dollar the creditor pays to secure a loan reduces by a dollar the price he will be willing to bid on the items the debtor is selling. And reducing the maximum amount a bidder is willing to bid will plainly reduce the expected proceeds from an auction. Since a would-be credit bidder is entitled to the cash proceeds of the amount he intends to bid on credit, there is no sense forcing creditors to incur costs shuffling money.

Opponents of credit bidding often claim that the procedure disserves the interests of the estate by dissuading cash bidders from participating at the bankruptcy auction. On this view, would-be cash bidders who would otherwise participate in an auction observe the size of the debtor's liability to the credit bidder. To the extent the credit – which will serve as the creditor's currency at auction – eclipses a would-be cash bidder's valuation of the assets, that party knows that the credit bidder can easily outbid him. He may thus elect to forgo the auction altogether rather than compete with the credit bidder. If other

cash bidders behave in kind, credit bidding could actually reduce the number of auction participants, depressing the ultimate winning bid.

This objection is wide of the mark, as there is nothing about the argument specific to credit bidding. Rather, the argument rests on the notion that bidders with deep pockets may deter bidders with limited resources. "For instance, if a would-be bidder knows that Warren Buffett plans to attend an auction, she is also surely aware that Buffett can top her reservation price for any or all of the assets on the block. Yet nobody proposes to ban wealthy *cash* bidders from participating in a bankruptcy auction." *Philadelphia Newspapers*, 599 F.3d at 321 n.4 (Ambro, J., dissenting) (quoting Buccola & Keller, *supra,* at 123).

That, of course, is in keeping with rational economic behavior. "Would-be bidders understand that a deep-pocketed player's ability to top their reservation price does not imply a willingness to do so. Warren Buffett did not become wealthy by overpaying for things, so it is possible, indeed, probable, that his reservation price for an asset at auction will be beneath that of another buyer. And buyers know this in advance." *Id.* The same logic holds for credit bidders. By bidding with credit, the secured creditor surrenders the cash he would otherwise receive for any offer beneath his bid. Would-be cash buyers therefore know that a credit bidder has no incentive to bid all of his credit unless he *actually* values the assets at that price. That the secured creditor may not highly prize the debtor's assets should prove

sufficient to bring interested cash bidders to the auction.

B. Denying a Secured Creditor's Ability to Credit Bid Disparages Property Rights without Valid Bankruptcy Purpose

Butner v. United States holds that the determination of property rights in the estate of a bankrupt generally falls to state law. 440 U.S. at 54-55. The case featured a dispute over the right to rents collected on the debtor's mortgaged property. By the time it reached this Court, the fight was more generally about what source of law would govern the dispute – state law or the bankruptcy judge's sense of equity. Observing that there is no reason to upset property interests "unless some federal interest requires a different result," the Court held that state law provides the rule of decision absent congressional say-so. *Ibid.*

Outside of bankruptcy, credit bidding safeguards a secured creditor's property interest in his collateral. Upon the debtor's default, a secured creditor may repossess collateral and auction it in a commercially reasonable manner, keeping proceeds up to the face value of the secured claim. Uniform Commercial Code §§ 9-610(a)-(c); 9-615(a). Credit bidding has long been among the features of such a commercially reasonable sale, and the same rule typically holds for a mortgagee who forecloses on real estate after default. *E.g.*, *Freedom Mortgage*, 569 F.3d at 670.

Petitioners insist that secured creditors get all the protection they need through the requirement that a plan give them the "indubitable equivalent" of the secured claim. *See* 11 U.S.C. § 1129(b)(2)(A)(iii). On their view the bankruptcy judge should find, without allowing credit bids (and presumably according to a judicial valuation of the assets), that the proposed plans indubitably give the equivalent value of the secured creditors' property interest in the collateral. Such a procedure would be unwise. To be sure, judicial valuation is an established part of bankruptcy practice. 11 U.S.C. § 506(a). Sometimes a bankruptcy court must assess the value of a secured claim without the aid of a sale. In a *bona fide* reorganization, where the debtor proposes to keep its assets and emerge from chapter 11 as a going concern – but with a clean balance sheet – there is often no alternative. No sale means no market to determine what the secured claims are worth. A neutral judge's estimate is the best measure. But open auction, where feasible, is better. *203 N. LaSalle*, 526 U.S. at 456-58.

Given the *Butner* principle, Petitioners must explain why a property interest traditionally protected by the power to credit bid in a commercially reasonable sale should be altered when the auction occurs as part of a plan of reorganization. Bankruptcy law does of course suspend the secured creditor's right, generally established under state law, to repossess and sell collateral on his own initiative. 11 U.S.C. § 362(a). But it does so to prevent a race to assets

that would destroy going-concern value for all. The justification for the stay's suspension of repossession-and-sale rights disappears once the debtor has marshaled assets and elected to conduct an orderly sale. Now the collective-action problem is solved; the bankruptcy-specific reason for suspending state-law rights vanishes. The debtor's objective should be to maximize the price its assets fetch, and, as shown above, it matters not at all whether the currency used is cash or credit.

CONCLUSION

The judgment of the Seventh Circuit should be affirmed.

Respectfully submitted,

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March 8, 2012

AMICUS CURIAE BRIEF

No. 11-166

IN THE

Supreme Court of the United States

RADLAX GATEWAY HOTEL, LLC, ET AL.,

Petitioners,

v.

AMALGAMATED BANK,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* G. ERIC BRUNSTAD, JR. IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*[1]

The undersigned *amicus curiae* is a frequent Visiting Lecturer in Law at the Yale Law School where he teaches courses on bankruptcy law, domestic and international business reorganizations, commercial transactions, secured transactions, federal courts, and argument and reason. He began teaching at Yale in 1990 and has also taught at the Harvard Law School. In addition to his teaching, the undersigned is a contributing author to COLLIER ON BANKRUPTCY, responsible for writing several chapters of the Treatise. He is also a partner at the law firm of Dechert LLP; a prior Chair of the ABA Business Bankruptcy Committee; a former member of the Judicial Conference Advisory Committee on the Federal Bankruptcy Rules; and a Fellow of the American College of Bankruptcy.

The undersigned has briefed and argued numerous bankruptcy matters before the Court, including *Schwab v. Reilly*, 130 S. Ct. 2652 (2010); *Milavetz, Gallop & Milavetz, P.A. v.*

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[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. All parties have been timely notified of the undersigned's intent to file this brief; both petitioners and respondent have consented to the filing of this brief. Copies of petitioners' and respondent's consents are filed herewith.

United States, 130 S. Ct. 1324 (2010); *Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33 (2008); *Travelers Cas. & Sur. Co. v. Pacific Gas & Elec. Co.*, 549 U.S. 443 (2007); *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007); *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004); and *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000). He has otherwise participated as counsel for one of the parties in numerous other bankruptcy matters before the Court, including *Stern v. Marshall*, 131 S. Ct. 2594 (2011); *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010); *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006); *Rousey v. Jacoway*, 544 U.S. 320 (2005); *Kontrick v. Ryan*, 540 U.S. 443 (2004); *Lamie v. United States Trustee*, 540 U.S. 526 (2004); *FCC v. NextWave Personal Commc'ns Inc.*, 537 U.S. 293 (2003); and *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249 (1992). In addition, he has prepared and filed with the Court several amicus briefs in bankruptcy cases, including *Hall v. United States*, no. 10-875 (2012); *Ransom v. FIA Card Services*, 131 S. Ct. 716 (2011); *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010); *Howard Delivery Serv., Inc. v. Zurich American Ins., Co.*, 547 U.S. 651 (2006); *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004); *Archer v. Warner*, 538 U.S. 314 (2003); and *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995).

The undersigned is deeply interested in the subject of bankruptcy law and has written, taught, and lectured on the subject of Chapter 11 plans, and specifically the proper treatment of secured claims under these plans. The purpose of this brief is to address matters that bear on the Court's determination of an important issue of bankruptcy law: whether a Chapter 11 debtor that proposes in a plan to sell an asset encumbered by a secured creditor's lien may strip away the creditor's right to credit bid at the sale of the asset. In particular, this brief explains the concept of credit bidding prescribed in section 1129(b)(2)(A)(ii) as a subset of the master requirement of section 1129(b) that a plan must be "fair and equitable" to the holders of secured claims who have voted to reject the plan. Because credit bidding in the context of asset sales is integral to the fair and equitable requirement, it cannot be disregarded under the guise of "indubitable equivalence" set forth in section 1129(b)(2)(A)(iii). In context, a sale that strips away a secured creditor's right to credit bid is simply not "fair and equitable" as this Court has explained the concept. Accordingly, the decisions below should be affirmed.

STATEMENT

Petitioners RadLAX Gateway Hotel, LLC and RadLAX Gateway Deck, LLC (the "Debtors") own and operate a hotel and parking structure. Respondent Amalgamated Bank ("Amalga-

mated") holds liens on these and other assets of the Debtors to secure repayment of a $142 million loan. Pet. App. 3a-4a.

In 2009, the Debtors filed for bankruptcy under Chapter 11 of the Bankruptcy Code. By operation of law, when a debtor commences a bankruptcy case, an estate is created consisting of all of the debtor's property. 11 U.S.C. § 541. Thus, after the Debtors commenced their bankruptcy case, their assets, including the hotel and parking structure, passed to their estate.

A trustee is not usually appointed in Chapter 11 cases, and the debtor typically continues to manage its business as the "debtor in possession" of the estate. 11 U.S.C. §§ 1101(1) (defining "debtor in possession" in a chapter 11 case), 1107 (prescribing the duties of the debtor in possession), 1108 (authorizing operation of business during chapter 11 proceedings). Accordingly, after they commenced their bankruptcy case, the Debtors continued to operate their hotel business as "debtors in possession."

After a bankruptcy case is filed, the provisions of the automatic stay apply, preventing creditors from taking action against estate property, or otherwise dismantling the estate. 11 U.S.C. § 362(a). Following the Debtors' bankruptcy filing, Amalgamated was thus enjoined from taking action to collect its debt or foreclose

its liens on the Debtors' assets, absent obtaining "relief from stay" from the bankruptcy court. *See* 11 U.S.C. § 362(d).

Under the Bankruptcy Code, a debtor's monetary obligations constitute "claims" against the debtor's estate, and the Code provides that any creditor holding a claim is entitled to file a proof of claim with the bankruptcy court. 11 U.S.C. §§ 101(10) (defining "creditor"), 501(a) (providing for the filing of proofs of claim), 502(b) (providing for the allowance or disallowance of claims). Accordingly, after the Debtors commenced their bankruptcy case, Amalgamated held a claim against the Debtors' estate and was entitled to file a proof of claim for the approximately $120 million the Debtors owed under the parties' lending arrangement. Pet. App. 4a-5a.

Under section 506(a) of the Code, a creditor holding a claim secured by liens on the debtor's property is generally treated as the holder of a "secured claim" to the extent of the value of its collateral. 11 U.S.C. § 506(a). Under section 506(a), if the value of the creditor's collateral exceeds the amount of its claim, the creditor is treated as "oversecured." On the other hand, if the value of the collateral is less than the amount of the claim, the creditor is generally treated as "undersecured" and becomes the holder of two claims: a secured claim equal to the value of the collateral, and an unsecured claim

equal to the deficiency (*i.e.*, an unsecured claim equal to the difference between the amount of the debt and the value of the collateral). *Associates Comm'l Corp. v. Rash*, 520 U.S. 953, 961 (1997) (section 506(a) "tells us that a secured creditor's claim is to be divided into secured and unsecured portions, with the secured portion of the claim limited to the value of the collateral"); *see also* 4 COLLIER ON BANKRUPTCY ¶ 506.03 at 506-10 (16th ed. 2009). The operation of section 506(a), however, is subject to certain exceptions. In Chapter 11 cases, section 1111(b)(2) permits a secured creditor to elect to have the entire amount of its claim treated as secured notwithstanding that the value of its collateral is less than the amount of its claim. 11 U.S.C. § 1111(b)(2). In this case, the Debtors proposed to bifurcate Amalgamated's claim under section 506(a) into a secured portion equal to the value of its collateral, and an unsecured portion equal to the deficiency. J.A. 37-38.

The practical aim of Chapter 11 is the successful confirmation of a negotiated plan that provides for the debtor's retention or sale of its assets, and the payment of claims. *See* 11 U.S.C. §§ 1123 (prescribing the contents of a chapter 11 plan), 1123(b)(4) (stating that a chapter 11 plan may "provide for the sale or all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests"), 1129 (prescribing the rules

governing confirmation of a plan); *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 North LaSalle St. P'ship*, 526 U.S. 434, 457 n.28 (1999) (quoting G. Eric Brunstad, Jr. et al., *Review of the Proposals of the National Bankruptcy Review Commission Pertaining to Business Bankruptcies: Part One*, 53 BUS. LAW. 1381, 1406 n.136 (1988)) ("the Chapter 11 process relies on creditors and equity holders to engage in negotiations toward resolution of their interests"). To this end, section 1121(b) of the Code gives a Chapter 11 debtor a limited, exclusive right to propose a Chapter 11 plan. 11 U.S.C. § 1121(b). In this case, the Debtors proposed a Chapter 11 plan that called for the sale at auction of their assets. Pet. App. 5a.

As part of their sales strategy, the Debtors endeavored to line up a "stalking horse" bid prior to their proposed auction – an advance bid by a potential purchaser subject to higher and better bids. Pet. App. 5a-6a. In this case, the stalking horse bid was for $47.5 million – far less than the Debtors' indebtedness to Amalgamated. *Id.* at 6a. In addition, the Debtors' proposed arrangement with the stalking horse bidder was potentially lucrative for the Debtors' insiders. If the stalking horse bid were successful, The Harp Group, Inc., an entity owned and controlled by the Debtors' principal, had the right to purchase an interest in the entity purchasing the assets. J.A. 105. Further, the existing management company, also controlled by the Debtors' princip-

al, would continue to manage the hotel. *Id.* In other words, at least one insider of the Debtors stood to gain if the proposed sale were successful by (1) enjoying the right to obtain an interest in the new owner of the assets, and (2) continuing to manage the hotel into the future.

In order for a plan to be effective, the bankruptcy court must confirm it, and section 1129 provides the general standards for confirmation. 11 U.S.C. § 1129. Among other things, a plan must comply with all applicable provisions of the Code, 11 U.S.C. § 1129(a), and these include the requirements that the plan divide claims into classes, specify whether each class is "impaired," and specify the treatment of each class. 11 U.S.C. §§ 1123(a)(1) (requiring the classification of claims), 1123(a)(2) (requiring designation of a class as impaired or unimpaired), 1123(a)(4) (requiring the plan to specify the treatment of each class). In general, because they hold specific lien rights against the debtor's property, secured creditors are entitled to be classified separately into their own individual classes. 7 COLLIER ON BANKRUPTCY ¶ 1122.03[3][c] at 1122-15 (16th ed. 2010) ("as a general rule each holder of an allowed claim secured by a security interest in specific property of the debtor should be placed in a separate class."). A class is "impaired" if the plan modifies the legal rights of the members of the class. 11 U.S.C. § 1124; *see Di Pierro v. Taddeo (In re Taddeo)*, 685 F.2d 24,

28-29 (2d Cir. 1982). In this case, the Debtors' plan classified Amalgamated's secured claim into its own class and properly designated Amalgamated's claim as "impaired." J.A. 38, 48, 52.

Under section 1123, a debtor may propose in its plan to modify the rights of secured creditors. 11 U.S.C. § 1123(b)(5) (providing that a plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence"). A debtor's ability to modify the rights of secured creditors, however, is limited by a number of other specific provisions of the Code designed to protect the secured creditors' rights. As explained in the Collier treatise, "the protections afforded secured creditors under the Code generally adhere first to the principle that the secured creditor is entitled to priority payment out of its collateral, and second to the principle that the secured creditor is entitled to receive the equivalent value of its collateral." 4 COLLIER ON BANKRUPTCY ¶ 506.02 at 506-9 (16th ed. 2009) (footnotes and citations omitted). As discussed below, among the key protections for secured creditors in Chapter 11 cases are those found in section 1129(b), including the requirement that a plan must be "fair and equitable" to the secured party. In this case, the Debtors proposed in their plan to modify Amalgamated's rights as a secured party, including by proposing the sale of Amalgamated's collateral

without permitting Amalgamated to credit bid its indebtedness. J.A. 52-53, 118, 149. The question presented is whether the Debtors may do so consistent with the provisions of section 1129(b)(2).

Creditors whose claims are impaired are entitled to vote on the proposed plan. 11 U.S.C. § 1126. The right to vote is significant because, under section 1129(a)(8), the bankruptcy court cannot confirm a plan unless each impaired class votes in favor of it. In general, the voting requirement serves two purposes. First, it permits creditors to determine for themselves whether the plan lies in their best interests, rather than have that determination made by the debtor, the court, or some administrative agency. *See LaSalle*, 526 U.S. at 457 n.28; *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 207 (1988). Second, it ensures that creditors will have a voice in the plan negotiation process – because creditors have the right to vote on the plan, the debtor has an incentive to seek their input and obtain their consent. *See* G. Eric Brunstad, Jr. & Mike Sigal, *Competitive Choice Theory and the Broader Implications of the Supreme Court's Analysis in* Bank of America v. 203 North LaSalle Street Partnership, 54 BUS. LAW. 1475, 1494 (1999) [hereinafter *Brunstad & Sigal, LaSalle*].

The creditors' ability to vote down a plan under section 1129(a)(8) is not absolute and is

subject to an important exception known as the "cram down" rule. Specifically, section 1129(b) permits the bankruptcy court to confirm a plan notwithstanding the dissenting vote of a particular class of claims (*i.e.*, "cram down" the plan over their dissenting vote) so long as the plan "does not discriminate unfairly" and is "fair and equitable" to the dissenting class. 11 U.S.C. § 1129(b); *LaSalle*, 526 U.S. at 441.[2] The cram-down rule of section 1129(b) thus counterbalances the voting requirement of section 1129(a)(8). Whereas the voting requirement provides an incentive for the debtor to negotiate the terms of its plan with its creditors, the cram down feature of section 1129(b) provides an incentive for creditors to be reasonable in their demands because if the plan is objectively "fair and equitable," it may be confirmed notwithstanding their dissenting vote. *See Brunstad & Sigal, LaSalle*, at 1494-95.

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[2] The unfair discrimination test is not implicated in this matter. For a discussion of the Chapter 11 voting regime and the doctrine of unfair discrimination, see G. Eric Brunstad, Jr. & Mike Sigal, *Competitive Choice Theory and the Unresolved Doctrines of Classification and Unfair Discrimination in Business Reorganizations Under the Bankruptcy Code*, 55 BUS. LAW. 1 (1999).

With respect to a class of secured claims, a plan is "fair and equitable" and may be crammed down over the secured creditors' dissenting vote if certain criteria are satisfied. These criteria are set out in section 1129(b)(2)(A), which provides in relevant part that "the condition that a plan be fair and equitable with respect to a class includes" three basic requirements:

> (i) . . . that the holders of [secured] claims retain the liens securing such claims . . . and [] that each holder of a claim of [the secured] class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;
>
> (ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or
>
> (iii) for the realization by such holders of the indubitable equivalent of such claims.

11 U.S.C. § 1129(b)(2)(A).

In this case, the Debtors' plan does not propose that Amalgamated retain its liens on its collateral. Instead, the plan provides that Amalgamated would be entitled to receive the proceeds from the sale of the collateral after the payment of certain expenses and priority claims. J.A. 52-53. Because Amalgamated will not retain its liens, option (i) is not applicable.

Nor does the Debtors' plan satisfy the requirements of option (ii). By its terms, option (ii) cross-references and incorporates section 363(k) of the Code, and section 363(k) provides that a secured creditor may "credit bid" its debt at the sale of its collateral (*e.g.*, use its debt like cash during the bidding process). 11 U.S.C. § 363(k). The Debtors' plan, however, specifically denies Amalgamated the right to credit bid. J.A. 118, 149. The precise question presented is whether the Debtors may proceed under option (iii) – the "indubitable equivalent" provision.

The courts below determined that the Debtors may not do so. Pet. App. 17a, 42a. Because these decisions are sound, they should be affirmed.

SUMMARY OF THE ARGUMENT

It is axiomatic that a Chapter 11 debtor may propose in its plan to modify the rights of secured creditors. 11 U.S.C. § 1123(b)(5). At the

same time, it is also axiomatic that the ability of a debtor to modify the rights of secured parties is constrained by a number of pivotal provisions of the Bankruptcy Code, including the requirement of section 1129(b) that the plan must be "fair and equitable" before it may be confirmed over the secured creditor's dissenting vote. 11 U.S.C. § 1129(b). As applied to secured claims, the fair and equitable standard has certain specific statutory requirements, but the overarching principle is one of absolute priority. Hierarchically, absolute priority means that (1) secured creditors are entitled to receive the value of their collateral ahead of both unsecured creditors and the debtor's equity holders; and (2) creditors as a whole are entitled to receive payment of their claims before equity holders receive or retain anything on account of their equity interests.

The right to credit bid in the context of a Chapter 11 sale of a debtor's assets is integral to the absolute priority concept embedded in section 1129(b). It is integral because, without it, debtors have an enhanced incentive to propose and seek to consummate asset transfers designed to benefit the debtors' insiders at the expense of the debtors' secured creditors. That is exactly what happened in this case: the Debtors here proposed to sell their assets to a stalking horse at a low value in a transaction that offered the Debtors' insiders lucrative benefits. Without the right to credit bid, secured creditors are han-

dicapped in their ability to block such violations of absolute priority: in order to participate in the auction process, they would have to raise substantial sums of additional cash, which under the circumstances may be difficult or impossible, particularly during periods of economic contraction. In reality, the right to credit bid ensures the secured creditor's ability to police and enhance the auction process efficiently and avoid violations of absolute priority of the kind at issue here.

This Court has addressed the contours of the absolute priority principle before, most recently in *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 North LaSalle St. P'ship*, 526 U.S. 434 (1999). Critically, the long history of the absolute priority concept reveals two dominant values: the preservation of hierarchical priorities in bankruptcy, and the prevention of collusive arrangements designed to erode this hierarchical order. *Brunstad & Sigal, LaSalle*, at 1488. Section 1129(b)(2) enforces these values through the medium of the "fair and equitable" standard generally, and the requirement of credit bidding specifically. Because the Debtors' plan violates both the letter and spirit of section 1129(b), the decisions of the courts below should be affirmed.

ARGUMENT

This Court is no stranger to the concept of absolute priority. In fact, the Court invented it over a century ago in the context of railroad equity receiverships. *Brunstad & Sigal, LaSalle* at 1497-98. The seminal early decisions discussing the absolute priority concept include *Louisville Trust Co. v. Louisville, N.A. & C. Ry. Co.*, 174 U.S. 674 (1899), where the Court recited "the familiar rule that the stockholder's interest in the property [of the debtor] is subordinate to the rights of creditors. First, of secured, and then of unsecured, creditors," concluding that "any arrangement of the parties by which the subordinate rights and interests of stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation." *Id.* at 684; *see also Consolidated Rock Prods. Co. v. Du Bois*, 312 U.S. 510, 529 (1941); *Case v. Los Angeles Lumber Prods. Co.*, 308 U.S. 106, 115-16 (1939); *Kansas City Terminal Ry. Co. v. Central Union Trust Co.*, 271 U.S. 445, 455 (1926); *Northern Pac. Ry. Co. v. Boyd*, 228 U.S. 482, 508 (1913).

In the business reorganization context, Congress codified the absolute priority rule as part of the "fair and equitable" requirement of section 77B(f) of the former Bankruptcy Act of 1898, 11 U.S.C. § 205, 48 Stat. 911, 919 (1934) (repealed 1938). Similar to section 1129(b), sec-

tion 77B(f) provided in relevant part that "the judge shall confirm the plan if satisfied that . . . it is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders . . . ." *Id.* The rule next appeared as part of the "fair and equitable" requirement of Chapter X of the former Act, which replaced section 77(B). *See* Bankruptcy Act of 1898, 11 U.S.C. § 621(2), 52 Stat. 883, 897 (1938) (repealed 1979). As explained in the legislative history to the current Bankruptcy Code enacted in 1978, the "fair and equitable" requirement of section 1129(b)(2) likewise codifies the concept of absolute priority: "[t]he general principle of the subsection permits confirmation notwithstanding nonacceptance by an impaired class if that class and all below it in priority are treated according to the absolute priority rule." H.R. REP. No. 95-595, at 413 (1977). As the legislative history further explains, in accordance with the absolute priority rule, "[t]he dissenting class must be paid in full before any junior classes may share," and while "[t]reatment of classes of secured creditors is slightly different because they do not fall in the priority ladder, [] the principle is the same." *Id.*; *see also Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 202 (1988) (observing that the absolute priority rule had its origins in judicial interpretations of "the undefined requirement of the early bankruptcy statute that reorganization plans be 'fair and equitable'").

As the Court stated in *LaSalle*, the longstanding reason for the "fair and equitable" requirement is "the danger inherent in any reorganization plan proposed by a debtor, then and now, that the plan will simply turn out to be too good a deal for the debtor's owners." 526 U.S. at 444 (citing the 1973 Report of the Commission on the Bankruptcy Laws of the United States, H.R. DOC. No. 93-137, pt. I, at 255 (1973), which discussed Congress' concern over "the ability of a few insiders, whether representatives of management or major creditors, to use the reorganization process to gain an unfair advantage."). As the Court observed, "[h]ence the pre-Code judicial response known as the absolute priority rule, that fairness and equity required that 'the creditors . . . be paid before the stockholders could retain [equity interests] for any purpose whatsoever." *Id.* (quoting *Boyd*, 228 U.S. at 508).

As this Court's decision in *LaSalle* demonstrates, these principles apply in full force here. In *LaSalle*, the debtor proposed in its plan to retain its main asset (a portion of an office building), *id.* at 438, without proposing to pay its secured creditor in full, *id.* at 439-40. Critically, the plan granted the debtor's old equity owners the exclusive right to purchase ownership interests in the new, reorganized entity. *Id.* at 440. As the Court viewed the matter, the chief problem with this arrangement was that it gave the old equity holders a right of purchase "without

extending an opportunity to anyone else either to compete for that equity or propose a competing reorganization plan," *id.* at 454, thereby violating absolute priority because of the arrangement's "protection against the market's scrutiny of the purchase price by means of competing bids or even competing plan proposals," *id.* at 456. It did not matter, the Court reasoned, that the arrangement might seem fair to "a judge in bankruptcy court" because in crafting the Code, Congress "narrow[ed] the occasions for courts to make valuation judgments," preferring instead "some form of market valuation" over "decisions untested by competitive choice." *Id.* at 457. In other words, the debtor's plan violated absolute priority (and was thus not "fair and equitable") because, by avoiding a competitive market test for the value of the ownership interests in the reorganized debtor, it failed to protect against the problem of old equity holders getting too good a deal.

The same considerations doom the Debtors' plan in this case. As Amalgamated explains in its brief, one of the key purposes of credit bidding is to ensure competition in the bidding process. Resp. Br. at 51-54 (citing Vincent S. J. Buccola & Ashley C. Keller, *Credit Bidding and the Design of Bankruptcy Auctions*, 18 GEO. MASON L. REV. 99 (2010); Jason S. Brookner, Pacific Lumber *and* Philadelphia Newspapers*: The Eradication of a Carefully Constructed Statutory*

Regime through Misinterpretation of Section 1129(b)(2)(A) of the Bankruptcy Code, 85 AM. BANKR. L.J. 127 (2011)). Credit bidding permits the secured creditor to participate in the auction process efficiently – the secured creditor is likely to be knowledgeable about the relevant assets and their value and may participate without having to come up with additional cash on top of the money it has already lent to the debtor. Critically, with increased participation, the auction price is more likely to be bid up. Resp. Br. at 51. In addition to maximizing the value of the debtor's assets, this competition also ensures that the debtor's old equity holders do not obtain value from the sale in violation of absolute priority. Without credit bidding, the debtor has an enhanced incentive to arrange a low-price sale to a friendly purchaser in a transaction that bestows lucrative benefits on the debtor's old equity owners because the denial of credit bidding deprives the secured creditor of its most efficient means to police the auction process. In this case, the Debtors' principal stands to gain significantly if the purchaser is the stalking horse bidder. J.A. 105. The proper way to superintend proposed transactions of this kind and ensure that they do not violate absolute priority is through the increased market-driven competition that credit bidding fosters.

It is not a valid counterargument that a secured creditor denied its right to credit bid

may participate in the auction process by offering cash bids. Large loans are often syndicated with numerous participants contributing portions of the funds lent to the debtor. Coordinating an additional advance of funds to make cash bids entails at a minimum significant costs and, in some instances, may be impossible altogether if, for example, one of the lending participants has become insolvent or otherwise unable to make additional advances. Because making cash bids at auction is costly (and sometimes impossible), requiring them can only discourage secured creditors from participating, thereby undermining the values that credit bidding was designed to promote.

It is likewise not a valid counterargument that credit bidding may be denied because it tends to chill or otherwise hamper the bidding process. By including a right to credit bid in sections 363(k) and 1129(b)(2)(A)(ii), Congress presumably thought otherwise – certainly the presumptive norm is that credit bidding *enhances* the auction process; otherwise, Congress would not have provided for it in the Code. In any event, it is not plausible to assume that credit bidding chills the process any more than the presence of a stalking horse bidder the debtor favors.

As this Court has observed, a potential difficulty with distressed asset sales outside the

bankruptcy process is that property sold through foreclosure may be liquidated in ways that generate seriously depressed prices. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 539 (1994) ("property that must be sold [through a quick liquidation procedure] is simply worth less" because "[n]o one would pay as much to own such property as he would pay to own real estate that could be sold at leisure and pursuant to normal marketing techniques.") (emphases omitted). As a potential means to ameliorate this problem, an insolvent debtor may file for bankruptcy and propose to liquidate its assets in ways that offer a better prospect of maximizing their value. *See* G. Eric Brunstad, Jr., *Bankruptcy and the Problems of Economic Futility: A Theory on the Unique Role of Bankruptcy Law*, 55 BUS. LAW. 499, 565-66 (2000) (discussing reduced realizations at foreclosure sales as a problem that bankruptcy law properly addresses).

On the other hand, as this Court acknowledged in *LaSalle* (discussed above), the debtor's ability to propose the terms of a sale in bankruptcy carries with it the risk that the debtor will seek to feather its own nest (or at least that of its equity owners) improperly. 526 U.S. at 444; H.R. DOC. No. 93-137, pt. I, at 255 (1973). Congress addressed this second-order challenge by incorporating into the Code the fair and equitable standard and the principle of absolute priority that the standard enforces. H.R. REP.

No. 95-595, at 413 (1977). And as section 1129(b)(2)(A)(ii) makes plain in the context of asset sales under a Chapter 11 plan, the right to credit bid is one of the key tools that ensures compliance with this standard.

It is certainly true that section 1129(b)(2)(A)(iii) also recognizes that a debtor may satisfy the fair and equitable test by proposing a plan that yields to the secured creditor the "indubitable equivalence" of its secured claim. 11 U.S.C. § 1129(b)(2)(A)(iii). But as the legislative history explains, "[t]he indubitable equivalent language is intended to follow the strict approach taken by Judge Learned Hand in the [case of] *In re Murel Holding Corp.*, 75 F.2d 941 (2d Cir. 1935)." S. REP. No. 95-989, at 127 (1978). Critically, the "strict" approach of *Murel Holding* is also one of absolute priority, and under it, the secured creditor's rights may not be stripped away unless the secured creditor receives alternative treatment that is completely compensatory for what it has been denied. The Debtors' plan in this case simply cannot meet this standard.

In *Murel Holding*, the debtor proposed a plan that would have allowed it to retain its property (an apartment building) while modifying the lien rights of its secured creditor over the secured creditor's objection. 75 F.2d at 941-42. Under section 77B of the former Bankruptcy Act,

the debtor might have crammed down its plan if the debtor had been able to provide the secured creditor "equitably and fairly" with "adequate protection" of its interest. *Id.* at 942. As the Second Circuit observed, however, in order to be "adequate," the secured creditor's "protection" had to be "completely compensatory." *Id.* The debtor's plan failed this standard (apparently because it was too risky), prompting the court to remark that there was "no reason to suppose that [section 77B] was intended to deprive [the secured creditor of his right either to receive payment or foreclose on his collateral for the sake of] junior holders, unless by a substitute of the most indubitable equivalence." *Id.*

Outside of bankruptcy, secured creditors generally enjoy the right to credit bid, and a sale that does not have the protection of credit bidding simply cannot be the "indubitable equivalent" of one that does, at least not in a manner consistent with the "fair and equitable" standard of section 1129(b) and the concept of absolute priority that credit bidding is designed to serve. Accordingly, the Debtors in this case cannot invoke the "indubitable equivalence" option set forth in section 1129(b)(2)(A)(iii) to avoid Amalgamated's right to credit bid.

CONCLUSION

For the foregoing reasons, as well as those offered by respondent, the decisions of the courts below should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 11-166

RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

RADLAX GATEWAY HOTEL, LLC
AND RADLAX GATEWAY DECK, LLC,
Petitioners,

v.

AMALGAMATED BANK,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE LOAN SYNDICATIONS AND TRADING ASSOCIATION, THE AMERICAN BANKERS ASSOCIATION, THE CLEARING HOUSE ASSOCIATION, THE COMMERCIAL FINANCE ASSOCIATION, THE COMMERCIAL REAL ESTATE FINANCE COUNCIL, THE EQUIPMENT LEASING AND FINANCE ASSOCIATION, THE FINANCIAL SERVICES ROUNDTABLE, THE MANAGED FUNDS ASSOCIATION, THE MORTGAGE BANKERS ASSOCIATION, AND THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Amici curiae are among the leading financial-industry trade associations in the United States. Together, they represent the entire spectrum of lenders and debt investors. Amici's members provide corporate and commercial loans, mortgage-backed financing, asset-backed financing, and commercial real-estate loans; they include the largest national and international financial institutions as well as regional and local lenders and private investment funds; and they serve borrowers in all corners of the country. Amici's members collectively hold trillions of dollars of debt.

The **Loan Syndications and Trading Association** represents a broad range of financial institutions, including commercial banks, investment banks, and private investment funds; its mission is to promote a fair, orderly, efficient, and growing corporate loan market and to provide leadership in advancing and balancing the interests of all market participants. The **American Bankers Association** is the principal national trade association of the banking industry, and its members hold a substantial majority of domestic banking assets. **The Clearing House Association** is the nation's oldest banking association and is owned by the world's largest commercial banks. The **Commercial Finance Association** is the principal U.S. trade association for financial institutions providing asset-based financing and factor-

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[1] The parties have consented to the filing of this brief. Pursuant to Rule 37.3(a), letters of consent are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than amici curiae, their members, and their counsel, made a monetary contribution to the preparation or submission of this brief.

ing services to commercial borrowers; its members comprise substantially all of the major money-center banks and many regional and local banks and other lenders and factors in the United States. The **Commercial Real Estate Finance Council** represents all commercial real-estate finance industry constituents and is dedicated to promoting the strength and liquidity of that market. The **Equipment Leasing and Finance Association** represents companies in the equipment-finance sector, including leasing and finance companies, banks, financial-services companies, brokers/packagers, investment banks, manufacturers, and service providers. The **Financial Services Roundtable** represents 100 of the largest integrated financial-services companies providing banking, insurance, and investment products to American consumers. The **Managed Funds Association** represents the global alternative-investment industry, including hedge funds, funds of funds, managed futures funds, and their service providers. The **Mortgage Bankers Association** represents all facets of the real-estate finance industry, including mortgage companies, life insurance companies, commercial banks, and Wall Street conduits. The **Securities Industry and Financial Markets Association** brings together the shared interests of hundreds of securities firms, banks, and asset managers, and supports a strong financial industry, investor opportunity, capital formation, job creation, and economic growth.

Although amici specialize in different aspects of financial services and frequently represent different asset classes in bankruptcy proceedings, they share a common interest in this case. Resolution of the question presented here—whether secured lenders are entitled to "credit-bid" their claims in a sale of their collat-

eral under a chapter 11 plan of reorganization—will have a substantial effect on the cost and availability of secured credit in the United States.

Outside bankruptcy, secured lenders are entitled to be paid in full or to foreclose on their collateral. In bankruptcy, where debtors' assets are often auctioned, the right to credit-bid protects secured creditors' basic bargain by ensuring that they can either retain their right to full payment and their liens or, if the collateral is sold, acquire it themselves. Because legal restrictions and transaction costs can make cash bidding difficult or even impossible, if a secured lender is denied the right to credit-bid, its collateral may be sold for less than the lender would have bid for it. In that circumstance, the lender will realize less than the true value of its security interest.

Secured lenders—including amici's members—have long relied on the right to credit-bid to protect themselves against potential undervaluation of their collateral in bankruptcy. A new rule allowing debtors to bar credit-bidding would increase the risk of undervaluation, and to compensate for that risk, lenders would be forced to increase the cost of capital. Such a rule would have a significant negative impact on the market for secured financing at a moment when the ready availability of affordable credit remains essential to the national economic recovery. Amici therefore urge this Court to affirm the judgment below.

STATEMENT

This case focuses on one of the Bankruptcy Code's most significant protections for secured creditors—a creditor's right to "credit-bid" the amount of its claim when its collateral is sold in bankruptcy. A trustee or

debtor-in-possession may, under certain circumstances, sell property encumbered by a lien. 11 U.S.C. §363; *id.* §1129(b)(2)(A)(ii). Outside the chapter 11 plan process, a secured creditor "may bid at such sale" and "offset [its] claim against the purchase price of [the] property" if it is the winning bidder, "unless the court for cause orders otherwise." *Id.* §363(k). That is, a secured lender may "credit-bid" by using the outstanding balance on its loan to pay the purchase price.

For example, if a debtor sells a warehouse with a $100,000 mortgage, the lender may bid up to $100,000 for the warehouse without committing any cash. If the lender's bid is not the highest bid, its lien attaches to the proceeds from the sale (and, typically, the lender will ultimately receive the proceeds). If the lender's bid prevails, it gets the warehouse and its claim is reduced by the purchase price. Through credit-bidding, the secured creditor can bid what it believes the collateral is worth without incurring the significant transaction costs associated with a cash bid.

The question presented here is whether secured creditors have the same right to credit-bid when their collateral is sold under a chapter 11 plan. Where, as here, a class of secured creditors has not consented to its treatment under a proposed plan, that plan may nonetheless be confirmed—or "crammed down," in bankruptcy parlance—only if it is "fair and equitable." To be fair and equitable "[w]ith respect to a class of secured claims," a plan must provide for one of three forms of treatment, laid out in the three clauses of §1129(b)(2)(A):

> (i) (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the

> debtor or transferred to another entity, to the extent of the allowed amount of such claims; and
>
> (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;
>
> (ii) for the sale, subject to section 363(k) of this title [which requires that secured creditors be permitted to credit-bid], of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale...; or
>
> (iii) for the realization by such holders of the indubitable equivalent of such claims.

11 U.S.C. §1129(b)(2)(A).

Put more simply: "Under (i), the reorganized debtor keeps the property and may be allowed to stretch out the repayment of the debt beyond the period allowed by the loan agreement, but the lien remains on the property until the debt is repaid. Under (ii), the debtor auctions the property free and clear of the mortgage but the creditor is allowed to 'credit bid.' ... Under (iii), the lien is exchanged for an 'indubitable equivalent,'" such as the collateral itself or a lien on property of unquestionably equal or greater value. *In re River East Plaza, LLC*, No. 11-3263, 2012 WL 169760, at *2 (7th Cir. Jan. 19, 2012) (Posner, J.).

Debtors here, RadLAX Gateway Hotel, LLC and RadLAX Gateway Deck, LLC, are single-asset real-

estate affiliates created to quarantine the financial risk of specific development projects. Those projects went "underwater"—that is, their value fell below the outstanding balance on the debtors' secured loans. A "stalking-horse" bidder, in which one of the debtors' owners has an equity stake, offered to buy the projects for a fraction of the existing debt and to retain existing management if its bid won.

Debtors wanted the stalking-horse bid to prevail. Accordingly, they proposed to sell their assets free and clear of their secured lender's lien, as clause (ii) permits, but *without* allowing their secured lender to credit-bid as clause (ii) requires. Debtors claimed that the plan could nonetheless be confirmed because the proceeds of the sale would provide the secured lender with the "indubitable equivalent" of its claim under clause (iii). The courts below correctly held that §1129(b)(2)(A) does not permit such a plan.

SUMMARY OF ARGUMENT

Debtors here want to sell their assets, which secure their substantial debt, to a stalking-horse bidder with ties to debtors' existing owners for a fraction of what debtors owe their secured lender. And they want to preclude their lender from credit-bidding on the assets because they are afraid the lender might outbid the stalking horse. They would prefer to erase the lender's lien and cash it out by giving it the proceeds of the restricted sale. But that is precisely the ploy that credit-bidding is designed to prevent.

Debtors' plan provides for a sale of their secured lender's collateral free and clear of the lender's lien—exactly the type of plan contemplated by clause (ii) of §1129(b)(2)(A). Debtors contend, however, that they

need not permit the secured lender to credit-bid, as clause (ii) requires, and may instead pay the lender the proceeds of the auction as the putative "indubitable equivalent" of its claim under clause (iii). Debtors argue that, by specifying three means of cramming down a class of secured creditors and separating them with the word "or," the statute unambiguously permits this scheme.

The text, structure, and purposes of the Code refute this interpretation of §1129(b)(2)(A). *First*, the most natural reading of §1129(b)(2)(A)'s three clauses is that each clause "govern[s], conclusively unless the [clause] itself indicates otherwise ..., the category of proceedings it addresses." *Bloate* v. *United States*, 130 S. Ct. 1345, 1355 (2010). Accordingly, asset sales free and clear of a creditor's lien are governed by the requirements for such sales set out in clause (ii). Debtors' reading would allow the more specific provisions of clauses (i) and (ii) to be trumped by the catch-all provision of clause (iii) and would effectively render clauses (i) and (ii) surplusage.

Second, debtors' interpretation of §1129(b)(2)(A) is wholly inconsistent with the structure of the Bankruptcy Code's protections for secured creditors. The Code is meticulously designed to prevent an "involuntary reduction of the amount of a creditor's lien for any reason other than payment on the debt." *Dewsnup* v. *Timm*, 502 U.S. 410, 418-419 (1992). Several interlocking provisions of the Code, including §1129(b)(2)(A), work together to protect that basic right. As Judge Hand put it, a secured creditor "wishes to get his money or at least the property. We see no reason to suppose that the statute was intended to deprive him of that ... unless by a substitute of the most indubitable equivalence." *In re Murel Holding Corp.*, 75 F.2d 941,

942 (2d Cir. 1935) (L. Hand, J.). Credit-bidding ensures that, if collateral is sold, the secured creditor can "get ... the property" securing its claim if the creditor values it more highly than other bidders do. As a logical matter, the proceeds of a sale at which the secured creditor is not permitted to credit-bid cannot be the "indubitable equivalent" of the right the secured creditor otherwise possesses to "get ... the property" itself.

Finally, a plan like debtors' serves no legitimate bankruptcy or commercial purpose, and sanctioning it will seriously unsettle the market for secured credit—a market in which amici's members are essential participants. Credit-bidding can only benefit the bankruptcy estate. Creditors can bid more for their collateral if they are not required to incur the significant costs associated with a cash bid. Moreover, some secured creditors will not be able to bid at all without credit-bidding. And, as this case illustrates, allowing debtors to deny the right to credit-bid without cause serves no purpose other than to enable debtors to steer their assets to lower bidders favored by debtors' owners or management, enriching insiders at creditors' expense. Debtors' reading of the Code thus provides an invitation to mischief with no offsetting benefits for the estate. Ultimately, credit markets will respond to such inefficiencies by increasing the cost of borrowing, harming debtors as well as creditors and the economy as a whole.

ARGUMENT

I. THE BANKRUPTCY CODE'S TEXT ENTITLES SECURED CREDITORS TO CREDIT-BID AT ANY FREE-AND-CLEAR SALE UNDER A PLAN

Chapter 11's cram-down provisions state that a plan is "fair and equitable" to a non-consenting class of

secured creditors only if it provides (i) that the creditor will keep its lien and receive deferred cash payments in the full amount of its secured claim, with a present value equal to the present value of its security interest; (ii) that the collateral will be sold, subject to credit-bidding, free and clear of the creditor's lien, which will attach to the proceeds of the sale; or (iii) that the creditor will realize "the indubitable equivalent" of its secured claim. 11 U.S.C. §1129(b)(2)(A).

Debtors maintain that, because the statute's three clauses are joined by the word "or," the statute unambiguously permits sales free and clear of a creditor's lien without credit-bidding under clause (iii). As discussed below, debtors' reading would open a gaping hole in the Bankruptcy Code's carefully woven protections for secured creditors and subject the plan-confirmation process to the risk of abuse by insiders. But it is not a plausible construction of §1129(b)(2)(A) even when the provision's text is examined in isolation.

It is a basic rule of construction that "[g]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment." *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U.S. 204, 208 (1932). Here, clause (ii) "specifically deal[s]" with sales of a secured creditor's collateral free and clear of its lien. By incorporating §363(k), clause (ii) expressly requires that credit-bidding be permitted (absent cause to deny it) at any such sale. Reading the "indubitable equivalent" provision of clause (iii) nonetheless to permit free-and-clear sales *without* credit-bidding replaces the specific protections Congress set out with a vague generality. To give effect to all of the words Congress wrote, clauses (i) and (ii) must be read to govern matters within their scope, and clause (iii) to

account for the possibility that there may be plan provisions *outside* the scope of clauses (i) and (ii) that are confirmable because they give the creditor the indubitable equivalent of its claim.

This Court decided a closely analogous question of statutory interpretation in *Bloate*, 130 S. Ct. at 1354-1355. There, the Court considered the provision of the Speedy Trial Act that automatically excludes from calculation of the speedy-trial deadline "[a]ny period of delay resulting from other proceedings concerning the defendant, including but not limited to" eight specific types of delay. *Id.* at 1352 n.7 (quoting 18 U.S.C. §3161(h)(1)). One of those eight specific examples is "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." *Id.* (quoting 18 U.S.C. §3161(h)(1)(D)). The question was whether other types of delay resulting from pretrial motions, such as delay before the motion was filed, were automatically excludable. This Court held that they were not, reasoning that the specific provisions of subparagraph (D) precluded construing the more general language of paragraph (1) to encompass any "delay resulting from any pretrial motion" not specifically identified in subparagraph (D). The Court explained that although "the list of categories [in paragraph (1)] is illustrative rather than exhaustive," that "in no way undermines our conclusion that a delay that falls within the category of delay addressed by subparagraph (D) is governed by the limits in that subparagraph." *Id.* at 1354.

The same is true here. Section 1129(b)(2)(A)(ii) does not describe the only type of plan that may be confirmed over a secured creditor's objection. But the existence of the more general "indubitable equivalent"

clause in no way undermines the conclusion that a cram-down plan falling within the category addressed by clause (ii)—that is, plans providing for a free-and-clear sale of collateral—must comply with the requirements of that clause, including the requirement of credit-bidding.

That reading is also required to prevent a glaring instance of statutory surplusage. It is a familiar rule that "'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001). If a debtor may sell collateral free and clear of liens without credit-bidding and call the proceeds the "indubitable equivalent" of the creditor's claim under clause (iii), then clause (ii), which allows such sales only *with* credit-bidding, would do no statutory work. It makes little sense that Congress would carefully enumerate specific requirements governing the treatment of a secured creditor's claim in a cram-down plan in clauses (i) and (ii), only to make it all irrelevant in clause (iii).[2]

As in *Bloate*, this Court should "avoid[] these problems by treating [clauses (i) and (ii)] as illustrative, but construing each of the [clauses] to govern, conclusively

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[2] Debtors argue (Br. 32) that their reading creates no surplusage because not all chapter 11 plans can satisfy the "indubitable equivalent" standard. But debtors' theory is that the proceeds from a free-and-clear sale of a secured creditor's collateral without credit-bidding can be the "indubitable equivalent" of the creditor's secured claim because the creditor is entitled only to the present value of its collateral—which, by debtors' hypothesis, is no more than the proceeds of the sale itself. *See* Br. 26, 36. On that reasoning, it is difficult to imagine any circumstance in which clause (ii) would apply.

unless the [clause] itself indicates otherwise ..., the category of proceedings it addresses." 130 S. Ct. at 1355. That reading gives effect to each of the provisions Congress crafted, gives compass to specific provisions as well as general ones, and makes sense of §1129(b)(2)(A) as a whole.

Debtors' contrary arguments are unpersuasive. *First* and foremost, they contend (Br. 18) that because §1129(b)(2)(A)'s three clauses are joined by the word "or," the statute "unambiguously afford[s] a debtor flexibility in meeting the 'fair and equitable' standard through any of the three enumerated alternatives." That is true as far as it goes, but it doesn't go very far. There is no question that the debtor may satisfy the fair-and-equitable standard through any of §1129(b)(2)(A)'s three clauses. The question is whether clause (iii)'s "indubitable equivalent" provision permits the debtors to conduct a free-and-clear sale of collateral without allowing credit-bidding, given the specific requirements imposed by clause (ii). For the reasons given above, the answer to that question is no.

Second, debtors argue (Br. 18-19) that "Congress knew how to limit the scope of the 'indubitable equivalent' standard when it wanted to do so." They point to §361, which specifies three ways of providing "adequate protection" against a decrease in the value of a creditor's security interest during bankruptcy: (1) cash payments in the amount of the decrease in value; (2) a replacement lien in the amount of the decrease in value; or (3) "such other relief, other than entitling such entity to compensation allowable ... as an administrative expense, as will result in the realization ... of the indubitable equivalent" of the security interest. 11 U.S.C. §361. By specifying that administrative-expense treatment (which gives claims for expenses incurred in ad-

ministering the bankruptcy estate priority over other unsecured claims, *see id.* §507(a)(2)) cannot provide the "indubitable equivalent" of a creditor's security interest, debtors argue, §361 demonstrates that there are no such limitations on the "indubitable equivalent" standard in §1129(b)(2)(A)(iii).

If that argument proves anything at all, it proves too much. The existence of a specific limitation in §361(3) hardly suggests that there are *no other* limitations on what may constitute the "indubitable equivalent," either in §361(3) or §1129(b)(2)(A)(iii). Debtors would presumably concede that cash payments of *less than* the decrease in value would not provide the "indubitable equivalent" of the creditor's security interest under §361(3). But debtors' proposal for satisfying §1129(b)(2)(A)(iii)—taking one specified means of treating a secured creditor's claim, subtracting a specific protection, and calling it the "indubitable equivalent"—is precisely analogous.[3]

Third, debtors point (Br. 20-22) to §1123(a)(5)(D), which they say "authorizes the sale of estate property free of liens to implement a chapter 11 plan" while containing no credit-bidding requirement. They compare that provision to §363(k), which does contain an express

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[3] Section 361(3)'s specific prohibition on administrative-expense treatment merely reflects Congress's rejection of pre-Code judicial decisions suggesting that administrative priority could constitute adequate protection. *See In re Yale Express Sys., Inc.*, 384 F.2d 990 (2d Cir. 1967). Because estates are not always able to pay their administrative claims in full, such protection is not "adequate." *See, e.g., In re Beker Indus. Corp.*, 64 B.R. 890, 899 (Bankr. S.D.N.Y. 1986); 3 *Collier on Bankruptcy* ¶361.03[4][a].

credit-bidding requirement. But that comparison is deeply flawed.

As an initial matter, the premise of debtors' argument is wrong—§1123(a)(5)(D) does not "authorize" anything. Section 1123(a), which governs the contents of a plan of reorganization, lists eight requirements, including, in paragraph (5), that the plan "shall ... provide adequate means for its implementation." Paragraph (5) then lists ten non-exclusive examples of what might constitute adequate means, including "(D) sale of all or any part of the property of the estate, either subject to or free of any lien." That language plainly does not "authorize" a debtor to sell property free of liens under a plan in any way the debtor chooses. Rather, §1123(a)(5) merely *refers to* general categories of transactions that may be authorized, subject to specific requirements, by other applicable provisions of the Bankruptcy Code or non-bankruptcy law.

Moreover, §1123(a)(5) applies to all plans—not only cram-down plans under §1129(b), but also consensual plans under §1129(a), in which secured creditors have agreed to the terms of the debtor's plan. Contrary to debtors' contentions, therefore, §1123(a)(5)(D) is not "the most logical place to include" a provision ensuring the right to credit-bid. The most logical place to include such a provision is exactly where Congress put it: in §1129(b), which governs what may and may not be done *without* the creditors' consent.

This Court accordingly need not reach the question whether §1123(a)(5)'s subparagraphs affirmatively au-

thorize the transactions they describe.[4] Even if §1123(a)(5)(D) did "authorize" free-and-clear sales in some sense, debtors do not contend that it overrides the specific provisions of §1129(b)(2)(A) governing all cram-down plans. Debtors' comparison between §363(k) and §1123(a)(5)(D) is thus irrelevant: The proper comparison is between §363(k) and §1129(b)(2)(A)(ii), the cram-down provision dealing with free-and-clear sales. Both §363(k) and §1129(b)(2)(A)(ii) expressly require credit-bidding at a nonconsensual free-and-clear sale, and those specific provisions must be given effect.

II. THE STRUCTURE OF THE BANKRUPTCY CODE'S PROTECTIONS FOR SECURED CREDITORS REQUIRES THE RIGHT TO CREDIT-BID

Debtors' reading of §1129(b)(2)(A) also cannot be squared with the Bankruptcy Code's overall design for protecting secured creditors. Debtors argue (Br. 24-28) that the Code entitles secured creditors only to "the present value of the[ir] ... collateral," and that secured lenders can therefore be involuntarily cashed out at that present value (as determined by a judge or by the winning bidder in a restricted auction). On the con-

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[4] That question has significant implications for an important issue on which the courts of appeals have divided: whether and to what extent §1123(a)(5) preempts non-bankruptcy law governing the ten transactions it lists. *Compare Pacific Gas & Electric Co.* v. *California ex rel. Cal. Dep't of Toxic Substances Control*, 350 F.3d 932, 946-948 (9th Cir. 2003), *with In re FCX, Inc.*, 853 F.2d 1149 (4th Cir. 1988). Because the issue is both complex and highly significant, and resolving it is wholly unnecessary to the resolution of this case, the Court should avoid language that lower courts might construe as granting the premise of debtors' argument.

trary, the Code is designed specifically to *prevent* debtors from cashing out secured creditors in this manner.

For over a century, courts have adhered to the principle that bankruptcy law does not permit an "involuntary reduction of the amount of a creditor's lien for any reason other than payment on the debt." *Dewsnup* v. *Timm*, 502 U.S. 410, 419 (1992). The general rule is that absent consent, full payment, or surrender of the collateral, a secured creditor's lien must survive the bankruptcy. *Id.* at 417. Several interlocking provisions of the Bankruptcy Code ensure this protective treatment for secured claims, and the right to credit-bid is an integral part of the statutory scheme.

Section 506(a) of the Bankruptcy Code typically "bifurcates" an undersecured claim: If a lien is secured by property worth less than the amount owed, the creditor's claim is divided into a secured claim equal to the present value of the collateral, as determined by the bankruptcy court, and an unsecured claim for the balance. 11 U.S.C. §506(a)(1). But judicial valuation of collateral can be risky. Because the undersecured creditor will likely receive only cents on the dollar for its deficiency claim, if the court undervalues the collateral, the lender may recover less than it should. For example, if a loan for $100,000 is secured by property that the court believes is worth $40,000 but the lender believes is worth $80,000, §506(a) might force the lender to accept $40,000 in satisfaction of its secured claim when it would much prefer the collateral itself.

Accordingly, §1111(b)(2) of the Code provides the undersecured creditor with an alternative: It may elect to have its entire claim treated as secured and give up its unsecured claim for the deficiency. *See* 7 *Collier on Bankruptcy* ¶¶1111.03[2][a], 1111.03[3][c], 1111.03[5]

(16th ed. 2011). The creditor thereby protects itself from being forced to accept less than it believes its collateral is worth. If the debtor wants to keep the collateral, the secured creditor can keep its lien, up to the full amount of its claim.

These provisions interact with the cram-down provisions through clause (i) of §1129(b)(2)(A), which applies whenever the debtor chooses to keep the collateral subject to the secured creditor's keeping its lien. Clause (i) entitles the lien-holder to deferred cash payments that both "total[] at least the allowed amount of [the lien-holder's] claim" and have "a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property." 11 U.S.C. §1129(b)(2)(A)(i)(II). In plainer terms, under clause (i), a debtor may in effect obtain a refinancing. If the creditor has elected fully secured treatment of its claim under §1111(b), the creditor retains its lien and its right to full payment on its loan, but the debtor can pay off the loan over time, as long as the stream of payments has a present discounted value equal to the present value of the collateral. For example, if the court values collateral securing a $100,000 loan at $40,000, the creditor is entitled to cash payments equal to $100,000 over time that, discounted for the time value of money, are worth $40,000 today.

It might seem that the difference between keeping a lien together with a $100,000 stream of payments worth $40,000 today and actually receiving $40,000 today is trivial, but it is not. By electing secured treatment for its entire claim and keeping its $100,000 lien in place, the secured creditor who believes its collateral is really worth $80,000 prevents the debtor from exiting bankruptcy, selling the property the next day for more

than the $40,000 court valuation, and keeping the difference for itself.

Indeed, both the leading treatise and the legislative history make clear that a major purpose of the §1111(b) election is to prevent the debtor from cashing out a secured creditor at the judicial valuation of the collateral when the creditor thinks the collateral is (or will eventually be) worth more. *See* 7 *Collier on Bankruptcy* ¶1111.03[3][c] ("The election can be utilized to prevent an attempted cash out .... A secured creditor, by electing to be fully secured under section 1111(b)(2), can require payment of the full amount of the claim, regardless of the value of the collateral."); 124 Cong. Rec. 32,408 (1978) (Rep. Edwards) ("The advantage [of the election] is that ... if the value of the collateral increases after the case is closed, the deferred payments will be secured claims.").[5]

Together, §1111(b) and §1129(b)(2)(A)(i) ensure that, if the debtor keeps the collateral, a secured creditor cannot be forced to accept anything less than its full claim. An involuntary "cash-out" at a judicial estimate (or debtor's estimate) of the collateral's present value is not permitted. *In re River East Plaza, LLC*, No. 11-3263, 2012 WL 169760 (7th Cir. Jan. 19, 2012) (Posner, J.), is instructive. In *River East*, the debtor attempted to use clause (iii) to bypass the protections of clause (i).

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[5] The Code's protections against such an involuntary cash-out are particularly important in single-asset real-estate cases like this one, where the disposition of the real estate is the central focus. "Congress specifically legislated to prevent ... the debtor" in such cases from "retain[ing] the property subject to the mortgage by paying an appraised value, over the objection of the secured creditor." 7 *Collier on Bankruptcy* ¶1129.03[4][c][ii][B].

The secured creditor held a $38 million lien on an underwater building project, for which the debtor planned to substitute a lien on Treasury bonds worth $13.5 million—the debtor's estimate of the project's present value. The Seventh Circuit rejected that scheme:

> River East's aim may have been to cash out [its creditor's] lien in a period of economic depression and reap the future appreciation in the building's value when the economy rebounds. Such a cashout is not the indubitable equivalent of a lien on the real estate, and to require it would be inconsistent with section 1111(b) of the Code, which allows the secured creditor to defeat such a tactic by writing up his secured claim to the full amount of the debt, at the price of giving up his unsecured claim to the difference between the current value of the debt and of the security.

Id. at *6.

Credit-bidding provides the secured creditor with similar protection in a case where collateral is to be sold. In that scenario, the creditor loses the right to have its full claim treated as secured but gets a safeguard of comparable value: the right to credit-bid. A secured creditor is not entitled to make the §1111(b) election if its collateral is to be sold. 11 U.S.C. §1111(b)(1)(A)(ii), (B)(ii). But that is because the "creditor has the opportunity to protect its position. It may bid its debt at the sale of the collateral and recover the collateral. This ability gives it the benefit of its bargain[.]" 7 *Collier on Bankruptcy* ¶1111.03[3][b].

As the legislative history makes clear, "[s]ale of property ... is excluded from treatment under section 1111(b) because of the secured party's right to bid in

the full amount of his allowed claim at any sale of collateral." 124 Cong. Rec. 32,407. The right to credit-bid is, in essence, the right to take title to the collateral unless someone else will pay more than the full value of the lien. *See* 7 *Collier on Bankruptcy* ¶1129.04[2][b][ii] ("[I]f the secured party thinks the collateral is worth more than the debtor is selling it for, it may effectively bid its debt and take title to the property."). A secured creditor thus need not accept what the debtor, or the court, or a stalking-horse bidder thinks its collateral is worth. If the collateral is to be sold, the creditor can bid what *it* thinks the collateral is worth and take possession of the collateral itself.

There is accordingly no merit to the debtors' suggestion (Br. 44) that the proceeds of a no-credit-bidding sale might provide the indubitable equivalent of the secured creditor's claim under clause (iii), making it appropriate to defer the question of equivalence until after the sale. When Congress permitted cram-down plans that provide a secured creditor the "indubitable equivalent" of its claim, it plainly had in mind the "equivalent" of what the rest of the Code painstakingly preserves for the secured creditor: full payment, secured by the creditor's lien, or the right to take the collateral. That is exactly what Judge Hand said when he coined the phrase "indubitable equivalent": "[A secured creditor] wishes to get *his money or at least the property*. We see no reason to suppose that the statute was intended to deprive him of that ... unless by a substitute of the most indubitable equivalence." *Murel Holding*, 75 F.2d at 942 (emphasis added). The legislative history confirms that principle: According to the Code's congressional sponsors, "[a]bandonment of the collateral to the creditor would clearly satisfy indubitable equivalence, as would a lien on similar collateral."

124 Cong. Rec. 32,407. In other words, the creditor can keep its entire lien (secured by collateral of unquestionably equal or greater value), or the creditor must get the property. Anything less is not the "indubitable equivalent" of the creditor's claim.

As one prominent scholar has put it, the notion that a free-and-clear sale without credit-bidding could provide the indubitable equivalent of the secured creditor's claim is "mystifying," "[g]iven that credit-bidding allows the secured creditor to gain control over the asset and any other plan necessarily gives it something less." Baird, *Car Trouble* 16 (U. Chi. John M. Olin Law & Econ. Working Paper Series) (May 2011), *available at* ssrn.com/abstract=1833731. Exactly so. Debtors seek to take one of the three ways the Code protects the same property right, subtract a protection of significant value, and call the result the "indubitable equivalent" of that right. That cannot be correct as a matter of law or logic.

Indeed, debtors' proposal is the textbook violation of the indubitable-equivalence standard. The leading treatise and the Code's sponsors agree that "present cash payments less than the secured claim would not satisfy the standard." 124 Cong. Rec. 32,407; *see* 7 *Collier on Bankruptcy* ¶1129.04[2][c]. But that is exactly what debtors are proposing. They are attempting to value the property at the highest cash bid (which may well be artificially low due to the inefficiencies of a bankruptcy auction), and then cash out the secured creditor at that amount without giving the creditor the option to take its collateral by credit-bidding its claim.

That result is precisely what §1129(b)(2)(A) is designed to prevent. The Code provides that the debtor may keep the collateral—in which case the creditor

may elect to have its full claim treated as secured, retain its lien, and receive deferred cash payments totaling its full claim (clause (i)) or it may sell the collateral while permitting the secured creditor to credit-bid up to the full value of its claim (clause (ii)). The debtor may also preserve the creditor's lien but substitute collateral of indubitably equal or greater value or abandon the collateral to the creditor (clause (iii)). But, absent the creditor's agreement, the debtor cannot keep the collateral or transfer it to a third party by cashing out the secured creditor for less than the full value of its claim.

That reading is further supported by the strong presumption that the Bankruptcy Code does not abrogate state-law property rights without a "clear and manifest" contrary intention. *See BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 543-545 (1994). As Justice Brandeis recognized long ago, the "right of the mortgagee to insist upon full payment before giving up his security ... [is] the essence of a mortgage." *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 579-580 (1935). That is, outside bankruptcy, the secured creditor is entitled to be paid in full or to foreclose on its collateral. It has long been understood that a critical aspect of that entitlement is "[t]he [lien-holder's] right to protect its interest in the property by bidding at [a] sale whenever held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair competitive sale or by taking the property itself." *Wright* v. *Vinton Branch of Mountain Trust Bank*, 300 U.S. 440, 457-459 & n.3 (1937) (reading statute to permit creditor to bid without restriction to avoid constitutional concerns). This Court recognized the form that such a bid takes: When "[t]he buyer ...

will be the mortgagee himself, [he] may offset the price against the debt." *W.B. Worthen Co.* v. *Kavanaugh*, 295 U.S. 56, 63 (1935); *see also Sage* v. *Central R.R. Co.*, 99 U.S. 334, 344-345 (1879); *Easton* v. *German-American Bank*, 127 U.S. 532, 538-539 (1888). Far from disclosing a "clear and manifest" intent to alter these basic rights of secured creditors, all evidence suggests that Congress carefully crafted the Code to preserve those rights.

Debtors argue that there are "numerous situations" in which the Code gives the secured creditor neither the right to credit-bid nor the right to keep its full lien by making the §1111(b) election. Again, debtors are wrong.

First, debtors contend (Br. 34) that collateral may be sold under §1129(b)(2)(A)(i), which contemplates possible "transfer[]" of the collateral to another entity. In that situation, debtors argue, a secured creditor may not make the §1111(b) election because the collateral will be sold, yet has no right to credit-bid, because clause (i) does not expressly mention credit-bidding.

But debtors simply assume the conclusion that clause (i)'s reference to "transfer" permits sales without credit-bidding. Although this Court need not reach the question, there is no reason to think that such a plan would be confirmable, and good reason to think it would not be. "Transfer" is a much broader term than "sale," *see* 11 U.S.C. §101(54), and a plan of reorganization can transfer property without selling it. In such a situation, the secured creditor remains entitled to exercise the §1111(b) election and retain its full lien. But where the plan provides for the *sale* of the debtors' collateral, and the creditor cannot retain its whole lien because that sale forecloses the §1111(b) election, it is

most consistent with the statutory structure and purpose to require that credit-bidding be permitted. *See In re California Hancock, Inc.*, 88 B.R. 226, 230-231 (B.A.P. 9th Cir. 1988) (rejecting a putative sale under clause (i) that did not permit credit-bidding and collecting authorities supporting the proposition that "the *sale exception* to section 1111(b)(1)(A) applies only where the lienholder is allowed to *credit bid*" (emphasis in original)).[6]

Second, debtors note (Br. 35) that courts may deny the right to credit bid "for cause." But that is merely the exception that proves the rule—or, rather, the exception the rule itself provides. And as debtors themselves concede, they "were unable to demonstrate cause in this case."

Third, debtors point out (Br. 35) that a creditor may not make the §1111(b) election if its interest in the collateral is of inconsequential value. That exception exists to prevent creditors with a minimal or merely theoretical interest in collateral—say, a junior lienholder with a lien on an underwater asset—from "holding up" a plan by insisting on fully secured treatment.

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[6] This conclusion is reinforced by the overall goal of all three clauses: to ensure "fair and equitable" treatment for the nonconsenting secured creditor. Whichever clause is nominally invoked, a plan involving the forced cash-out of a secured creditor through a sale without credit-bidding, thus permitting an insider to take from the collateral value that by right belongs to the secured creditor, is not "fair and equitable." *Cf., e.g., Bank of Am. Nat'l Trust & Sav. Ass'n* v. *203 N. LaSalle St. P'ship*, 526 U.S. 434, 444 (1999) (reason for "fair and equitable" requirement is "the danger inherent in any reorganization plan proposed by a debtor, then and now, that the plan will simply turn out to be too good a deal for the debtor's owners").

7 *Collier on Bankruptcy* ¶1111.03[3][a]. Such a creditor is treated differently from other secured creditors because its claim is essentially unsecured.

Finally, debtors argue (Br. 35-36) that even a creditor that has made the §1111(b) election is not "guaranteed to participate in the future appreciation of its collateral" because debtors can modify liens. Leaving aside the dubious merits of the debtor's hypothetical lien-modifying plan, this argument misses the point in a way that colors debtors' entire brief. The question presented in this case is not whether a secured creditor is "guaranteed ... the future appreciation of its collateral" or limited to the collateral's present value. Rather, the question is how the collateral's present value will be determined.

Debtors assume that the present value of the collateral is an easily determinable number that a judge can calculate independent of the processes by which the property will be sold. But "[i]n practice, no problem in bankruptcy is more vexing than the problem of valuation." *203 N. LaSalle*, 526 U.S. at 466 n.5 (Stevens, J., dissenting) (internal quotation marks and citation omitted). Accordingly, "one of the Code's innovations [was] to narrow the occasions for courts to make valuation judgments." *Id.* at 457 (majority). The Code's preference, instead, is for "decisions ... []tested by competitive choice" and reflecting the judgments of the creditors themselves. *Id.* at 457-458.

Credit-bidding is part of that competitive testing process: It gives the secured creditor the right to participate in the valuation of its own collateral, up to the full amount of its claim, by bidding in an open auction. Credit-bidding thus is not a device for appropriating more than the present value of the collateral, but a

mechanism for more accurately determining what that present value is. *See, e.g.*, Resnick, *Denying Secured Creditors the Right To Credit Bid in Chapter 11 Cases and the Risk of Undervaluation*, 63 Hastings L.J. 323, 340 (2012) ("[H]ow can [one] know that the bankruptcy court accurately valued the collateral if there was no market test by auction at which the noteholders had a right to credit bid?"). In short, the creditor's right to credit-bid is simply the right to obtain its collateral if the creditor values the collateral more highly than others do. If a creditor is precluded from exercising that right, the proceeds of an auction cannot represent the true "present value" of the collateral.

III. Denying Credit-Bidding Serves No Legitimate Purpose And Will Adversely Affect The Market For Secured Credit

The debtors' interpretation should also be rejected because there is no legitimate bankruptcy or commercial purpose for precluding credit-bidding at an asset sale, absent "cause" under §363(k). Credit-bidding only benefits the estate, and its absence invites mischief and manipulation by favored bidders, old equity, or existing management. Moreover, adopting debtors' rule will inevitably have an adverse effect on the availability and cost of secured credit, which will ultimately harm debtors and creditors alike.

A. Denying Credit-Bidding Serves No Legitimate Purpose

Debtors make no serious attempt to explain how denying secured lenders the right to credit-bid will serve the central aim of the bankruptcy process: "maximizing the value of the bankruptcy estate." *Toibb v. Radloff*, 501 U.S. 157, 163 (1991). Indeed, there is no

way in which constraining a secured lender's ability to bid, and thus limiting the number of potential bidders at an auction, can possibly maximize the value of the auctioned property. To the contrary, "credit bidding is an unalloyed good" for the bankruptcy estate, and "keeping a credit bidder from participating ... is an unsupportable strategy, at least for a debtor intent on maximizing its sale proceeds." Buccola & Keller, *Credit Bidding and the Design of Bankruptcy Auctions*, 18 Geo. Mason L. Rev. 99, 119-120 (2010).

As this case shows, however, debtors are not always primarily concerned with maximizing the value of the estate: A cheap sale to a debtor's preferred bidder can benefit existing equity-holders or management at the expense of third-party creditors or other stakeholders. Denying credit-bidding thus facilitates the sale of collateral at a discount to a bidder favored by debtors' existing management or owners, elevating their self-interest over the paramount aim of maximizing the estate.

Credit-bidding benefits the bankruptcy estate for at least three reasons. *First*, credit-bidding increases the number of available bidders, and having more bidders tends to produce higher bids. Auction theory (and common sense) make clear that the winning bid reflects what the highest and next-highest bidders are willing to pay. Adding more bidders thus can only increase the winning bid, and excluding a bidder can only decrease it—especially at expedited bankruptcy sales where the stalking horse may be the only party prepared to come with cash in hand. An auction with N+1 bidders is always better than an auction with only N, but this is especially so where N is very small.

Second, the secured lender is not just any bidder. It is likely to have particularly good information about the asset to be sold. At expedited sales, lack of information may discourage some parties from participating at all, and may cause others to discount their bids in light of the risk that they have misvalued the asset. *See, e.g.*, Akerlof, *The Market For "Lemons": Quality Uncertainty And The Market Mechanism*, 84 Q.J. Econ. 488 (1970). The secured lender likely knows the value of the asset better than most, and so may bid more confidently at higher values. Excluding or discouraging its participation is thus particularly damaging. *See* Buccola & Keller at 120.

Moreover, the secured lender has a particularly strong incentive to deter abusive insider bidding or management self-dealing. Bankruptcy proceedings present a principal-agent problem, in which the incentives of the debtor's owners and existing management are unlikely to accord with those of the creditors whose interests the debtor-in-possession has a duty to protect. Present management may have an incentive to favor "white knight" bidders who will preserve the existing business (and management's own positions). *See Dynamics Corp. of Am.* v. *CTS Corp.*, 805 F.2d 705, 711 (7th Cir. 1986). The secured creditors directly bear the costs of low-ball bids on their collateral and so have an incentive to defeat them. "Credit bidding affords them a ready tool to effectively act on that incentive," and, conversely, excluding the secured lenders from bidding their credit "is the most effective means for management to steer the debtor's assets to a favored, low-value purchaser." Buccola & Keller at 120.

Finally, credit-bidding minimizes the substantial costs associated with preparing and financing a cash bid and thus maximizes what the secured creditor can af-

ford to pay (because the bidder who can avoid the additional costs of a cash bid can offer that much more for the asset). Forcing the secured lender to pay in cash simply imposes a tax on the lender and means that the estate realizes less on the sale. From the standpoint of estate maximization, this is manifestly ill-conceived. *See* Buccola & Keller at 121.

The experience of amici and their members teaches that cash bidding cannot substitute for credit-bidding for several practical reasons. As an initial matter, few entities have the necessary cash on hand to purchase the kinds of properties typically at issue in commercial bankruptcies. Creditors will thus incur interest payments and fees to investment bankers, lawyers, and others who may be necessary to structure such large-scale transactions. Moreover, when a creditor wins its collateral with a cash bid, the cash is not immediately returned to the creditor. Instead, the cash flows into the estate, and the creditor obtains a lien on the cash. 11 U.S.C. §1129(b)(2)(A)(ii). The creditor's money will thus be unavailable for as long as it takes to consummate the plan and distribute the estate's assets. These costs—both out-of-pocket expenses and time-value losses—are a deadweight loss that harms both creditors and the estate. And that is assuming, contrary to recent evidence, that credit will necessarily be available to finance a cash bid. If credit markets are frozen, bidding will be impossible for all but the most cash-flush creditors.

Even more importantly, some secured creditors may not be able to bid at all if prevented from credit-bidding. The coordination costs of organizing a cash bid can be prohibitive. Bankruptcy sales are often highly expedited, and cash bidding may require time-consuming due-diligence work by potential financiers.

And many modern commercial financings involve syndicates of secured lenders or groups of secured bondholders, which complicates the tendering of cash bids on their collective behalf. Moreover, some of today's most common commercial creditors operate under legal restrictions that prevent them from making cash bids. More and more loans are held by mutual funds or collateralized loan obligations (CLOs) whose operations are governed by indentures restricting the uses that can be made of available cash. These indentures may not allow such creditors to use or borrow cash to purchase property, even if that cash will ultimately be returned to the creditor.[7]

In short, barring credit-bidding discourages or completely forecloses participation by a low-cost, high-information bidder. Such a choice cannot serve creditors' best interests.

There is no reason creditors should prefer cash bids to credit bids: Both equally reduce the debt on the estate's balance sheet. Nor is there substance to the idea that the deep-pocketed credit-bidder chills participa-

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[7] This problem is particularly acute for commercial real-estate loans held in commercial mortgage-backed securities (CMBS). The vast majority of these loans are held in "real estate mortgage investment conduits" (REMICs), trusts prohibited from raising cash after the initial issuance of the debt they hold for their beneficiaries. Loss of REMIC status has severe tax consequences that will essentially foreclose cash bidding for a significant proportion of commercial debt: One quarter of all commercial and multifamily mortgage debt is held in CMBS, and as of the fourth quarter of 2011, 8.6% of the loans in outstanding CMBS were 30 days or more delinquent or in foreclosure or real-estate owned. *See* Mortgage Bankers Association, *Commercial Real Estate/Multifamily Finance Quarterly DataBook, Q4 2011* (forthcoming March 2012).

tion by others. The same would be true of any deep-pocketed bidder, and an auction can ill afford to exclude the participants with the greatest resources on the grounds that they might outbid everyone else. And debtors' suggestion (Br. 52-53) that the secured creditor might bid its full claim, above the collateral's "current value," to take the collateral and "defeat[] the purpose of the auction" is telling. The purpose of an auction is to realize the maximum value for the estate, not to aid the debtor in steering property toward a preselected buyer with insider ties. From the estate's perspective, there could hardly be a better result than a secured creditor's agreement to write off the entire debt the estate owes it in exchange for property worth less than that. Denying credit-bidding can only assist schemes by debtors or their insiders to take value from the estate at creditors' expense.

B. Denying Credit-Bidding Will Adversely Affect The Market For Secured Credit

Ultimately, permitting debtors to preclude credit-bidding benefits no one—not even debtors. Making "bankruptcy provisions [more] 'friendly to debtors' [works] only in the short run; in the long run, the fewer rights that creditors have in the event of default, the higher interest rates will be to compensate creditors for the increased risk of loss." *River East Plaza*, 2012 WL 169760, at *7. Taking away secured creditors' right to credit-bid will have precisely that effect, and risks destabilizing the market for secured credit at a time when the national economy remains fragile.

Lending markets necessarily factor risk, including risks associated with bankruptcy, into lending decisions and pricing. And the essence of secured credit is that the creditor is able to look to the collateral as an alter-

nate source of repayment if the debtor fails to pay. The ability to take possession of the collateral is thus essential to the secured creditor's assessment of the risk it incurs in lending. If debtors could bar their secured lenders from credit-bidding, lenders would need to increase interest rates and impose more stringent terms on borrowers to account for the possibility that they could be denied the full value of their collateral in bankruptcy.

Put another way, lenders would be forced to decide how to price the risk that they could lose their fundamental right as secured creditors either to be paid in full or take their collateral. The entire market for secured credit is founded on that right, and on the basic principle, until recently well-established, that the right exists inside as well as outside bankruptcy. Debtors' construction of the cram-down provisions thus "uproots settled expectations of secured lending." *In re Philadelphia Newspapers, LLC*, 599 F.3d 298, 337 (3d Cir. 2010) (Ambro, J., dissenting).

"[S]ecured credit lowers the costs of lending transactions not only by increasing the strength of the lender's legal right to force the borrower to pay, but also ... by limiting the borrower's ability to engage in conduct that lessens the likelihood of repayment." Mann, *Explaining the Pattern of Secured Credit*, 110 Harv. L. Rev. 625, 683 (1997). Permitting debtors to lessen the likelihood of repayment by denying credit-bidding will inevitably increase the cost, and potentially restrict the availability, of secured credit. Moreover, it will introduce serious uncertainties into both the primary secured-lending market and the secondary debt market, as market participants attempt to quantify and protect against the increased risk. The upshot will be that less investment will be made through borrowing,

more non-bankrupt debtors will fail, and fewer chapter 11 debtors will successfully reorganize. U.S. credit markets are slowly recovering from the worst financial crisis since the Great Depression. This is no time to introduce new uncertainty and risk.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

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